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No. 05-

IN THE

Supreme Court of the United States

NOKIA INC., *et al.*,

Petitioners,

v.

GARRETT NAQUIN, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Pursuant to authority delegated by Congress, the Federal Communications Commission ("FCC") has promulgated detailed regulations governing radio frequency ("RF") emissions from wireless telephones. In particular, the FCC has determined that wireless telephones that comply with federal testing and RF emission standards are safe for consumer use throughout the United States.

Respondents challenge that determination in class actions alleging that FCC-approved wireless telephones are nonetheless defective and unreasonably dangerous under state tort law because of the level of RF emissions they produce. The district court held that respondents' claims were preempted by the federal regulatory regime, but a divided panel of the Fourth Circuit reversed that judgment. The questions presented are:

1. Whether the comprehensive federal RF testing and emission rules for wireless telephones preempt lawsuits that seek to declare FCC-approved wireless telephones "unreasonably dangerous" as a matter of state law.

2. Whether the categorical statutory ban on state "entry" regulation in 47 U.S.C. § 332(c)(3)(A) precludes state law from imposing new RF standards or operational requirements on wireless telephones as a condition for providing wireless service within the State.

LIST OF PARTIES

A. Petitioners

AT&T Corporation; Audiovox Communications Corporation; BellSouth Mobility LLC, *successor-in-interest to BellSouth Mobility, Inc.*; Cingular Wireless LLC,*formerly known as* BellSouth Mobility, Inc.; Ericsson Inc.; Kyocera Wireless Corporation, *as successor in interest to Qualcomm;* Motorola, Inc., *incorrectly named as Motorola Corporation;* NEC America, Inc.; Nextel South Corp., *incorrectly named as Nextel Communications, Inc.;* Nokia Inc.; Philips Electronics North America Corporation ("PENAC"); QUALCOMM Incorporated, *incorrectly named as Qualcomm Corporation.*

B. Respondents

Garrett J. Naquin; Judith A. Kaufman; Asher Rubenstein.

C. Not Parties

The following entities were listed as defendants-appellees in the caption to the circuit court's decision below, but *are not* parties to this petition: Ericsson Wireless Communications, Inc.; Nextel Partners Operating Corporation; Cingular Wireless a/k/a Washington Baltimore Cellular Limited Partnership; Cellco Partnership doing business as Verizon Wireless; Verizon Communications Inc.; Verizon Maryland Inc.; Panasonic Corporation of North America, incorrectly named as Matsushita Corporation of America; SBC Communications, Inc.; Cellular One Group; Voicestream Wireless Corporation, now known as T-Mobile USA, Inc.; Communications Electronics, Inc. a/k/a C.E.I., Inc.; Comcast/Metrophone; Southern Communications Services, Inc., incorrectly named as Southern Telecom, Inc., also known as Southern Linc; Powertel, Inc.; Powertel PCS, Inc.; Powertel/Atlanta, Inc.; MCI Worldcom Communications,

Inc.; Mitsubishi Wireless Communications, Inc.; Globalstar USA, Inc.; Baltimore Business Communications, Inc.; Sony Electronics Inc.; SANYO North America Corporation, incorrectly named as Sanyo North America, Inc. and Sanyo Corporation; Samsung Electronics America, Inc.; Sprint Spectrum L.P. doing business as Sprint PCS; Sprint PCS Limited Partnership; Cellular Telecommunications & Internet Association; Telecommunications Industry Association; Nextel Communications of the Mid-Atlantic, Inc. and Nextel of New York, each incorrectly named as Nextel Communications, Inc.; SBC Telecom Inc.; Cellular Telecommunications Industry Association; Westinghouse Communications; John Does 1-100; AB Cellular Holdings, LLC, doing business as LA Cellular, doing business as Los Angeles Cellular Telephone Company; Radiofone; Planet Cellular Communications, Incorporated; Visitor Cellular L.L.C.; Bell South Mobility; U.S. West Wireless, L.L.C.; U.S. West Communications, Incorporated; GTE Mobilnet of San Diego, Incorporated; GTE Wireless of San Diego, LLC; Cellular Carriers Association of California; LGIC Corporation; Panasonic Corp.; Samsung Electronics America, Inc.

CORPORATE DISCLOSURE STATEMENT

AT&T Corp. is a public company. AT&T Corp. has no parent company as of the date of this filing, but on January 30, 2005, AT&T Corp. entered into an Agreement and Plan of Merger with SBC Communications, Inc. (SBC) and a subsidiary of SBC. No publicly held company owns more than 10% of the stock of AT&T Corp. as of the date of this filing.

The only publicly held company that owns 10% or more of the stock of Audiovox Communications Corporation is Audiovox Corporation.

BellSouth Mobility LLC ("BellSouth Mobility") is a wholly-owned subsidiary of Cingular Wireless LLC. No publicly held corporation owns more than 10% of the stock of BellSouth Mobility.

Cingular Wireless LLC, formerly known as BellSouth Mobility, Inc., a/k/a Southwestern Bell Wireless, formerly known as Southwestern Bell Mobile Systems, Inc., has no parent company. Cingular Wireless LLC is indirectly owned by SBC Communications, Inc. and BellSouth Corporation, which are the only publicly held corporations with a 10% or more ownership interest in Cingular Wireless LLC.

Ericsson Inc.'s parent company is Ericsson Holding II Inc., a subsidiary of Telefonaktiebolaget LM Ericsson. Telefonaktiebolaget LM Ericsson is publicly held and trades in the United States through American Depositary Receipts under the name LM Ericsson Telephone Company.

The only publicly held company that owns 10% or more of the stock of defendant Kyocera Wireless Corporation is Kyocera International, Inc.

Motorola, Incorporated has no parent corporation and no publicly held company owns 10% or more of its stock.

NEC America, Inc. ("NEC") is a privately owned New York corporation. The parent corporation of NEC is NEC USA, Inc., which is also privately held. The parent of NEC USA, Inc. is NEC Corp. NEC Corp. is listed on the NASDAQ for ADR (American Depository Receipts).

Nextel South Corp. is a wholly-owned subsidiary of Nextel Finance Company, which, in turn, is a wholly-owned subsidiary of Nextel Communications, Inc. Legg Mason Capital Management, Inc. and Fidelity Management and Research Company each own more than 10% of the stock of Nextel Communications, Inc. On August 3, 2005, the Federal Communications Commission and the Antitrust Division of the Department of Justice approved a proposed merger between Nextel Communications, Inc. and Sprint. The deal is expected to close in the third quarter of 2005. Under the terms of the proposed transaction, all of the stock of Nextel Communications, Inc. is to be owned by Sprint Nextel Corporation.

Nokia Inc. is a privately held Delaware corporation and wholly-owned subsidiary of Nokia Holding Inc. Nokia Holding Inc. is a privately held Georgia corporation and wholly-owned subsidiary of Nokia Corporation, a public limited liability company incorporated under the laws of the Republic of Finland. Nokia Corporation is the ultimate parent company, and as far as Nokia is aware, no private or publicly held company owns 10 percent or more of Nokia Corporation's stock.

Nokia Mobile Phones Inc., f/k/a Nokia Mobile Phones Americas Inc., f/k/a Nokia Mobile Phones Manufacturing USA Inc., is a privately held Delaware corporation that was incorporated on May 7, 1992 as a wholly-owned subsidiary of Nokia, Inc. n/k/a Nokia Holding Inc., a Georgia corporation. Nokia Mobile Phones Inc. changed its corporate name to Nokia Inc. effective January 1, 2001.

Philips Electronics North America Corporation ("PENAC[illegible]s a wholly owned subsidiary of Philips Holding [illegible] Inc., which in turn is a wholly owned subsidiary of Koninklijke Philips Electronics N.V., which is a publicly traded company.

No publicly held company owns 10% or more of the stock of Qualcomm Incorporated, and Qualcomm Incorporated has no parent corporations.

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OPINIONS BELOW

The Fourth Circuit's decision is reported at 402 F.3d 430, and reprinted in the Appendix ("App.") at 1a-50a. The district court's decision granting petitioners' motion to dismiss is reported at 248 F. Supp. 2d 452, and reprinted at App. 51a-76a. The district court's decision denying respondents' motion to remand is reported at 216 F. Supp. 2d 474, and reprinted at App. 77a-129a.

JURISDICTION

The Fourth Circuit rendered its decision on March 16, 2005, App. 3a, and denied a timely petition for rehearing on April 12, 2005. App. 130a. On July 8, 2005, the Chief Justice extended petitioners' time to file this petition up to and including August 10, 2005. This Court has jurisdiction under 28 U.S.C. § 1254.

PERTINENT CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The pertinent constitutional, statutory, and regulatory provisions are set forth in the Appendix, App. 134a-183a.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

This case is about the proper balance between federal and state authority over a critical channel of interstate communication and commerce—the modern wireless telephone network.[1] For almost a century, the Federal

[1] In the proceedings below, this case was consolidated with four similar cases, and the Fourth Circuit's decision was thus rendered *sub nom Pinney v. Nokia, Inc.*, 402 F.3d 430 (4th Cir. 2005). The Fourth Circuit's opinion in *Pinney* embodies two judgments—a finding of a lack of federal subject matter jurisdiction in four of the consolidated cases, and a holding on the merits as to the defense of federal preemption in the fifth case, where federal jurisdiction was not at issue. This petition concerns only the fifth case, *Naquin v. Nokia, Inc.*, and seeks review of the Fourth Circuit's reversal of the district court's dismissal with prejudice of the *Naquin* complaint on federal preemption grounds. *See* pp. 14-16, *infra*.

Government—to the exclusion of the States—has exercised plenary control over the design and operational standards that govern every form of interstate communication by radio. As this Court recognized more than 70 years ago: "No state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities." *Fed. Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933). The Communications Act acknowledges this need for uniform, national standards by granting the FCC broad power over all technical aspects of radio communications, including spectrum licensing, frequency assignment, signal strength, resolution of interference issues, and the "kind of apparatus to be used" for all forms of wireless communication. 47 U.S.C. § 303.

Pursuant to this statutory mandate, the FCC has established detailed standards governing RF emissions by all fixed and portable wireless transmitters, including wireless telephones. After extensive rulemaking proceedings that included contributions and approval from the Food and Drug Administration ("FDA"), the Environmental Protection Agency ("EPA"), and the Occupational Safety and Health Administration ("OSHA"), the Commission arrived at a comprehensive set of pre-market testing standards, maximum RF emission levels, and equipment authorization procedures for all wireless telephones sold or leased in the United States. These regulations strike a balance between two competing national priorities—public health and safety on the one hand, and reliable and efficient interstate wireless communications on the other.

A divided panel of the Fourth Circuit has now rendered meaningless the careful balance achieved in the federal RF regulations. Under the decision below, state courts are authorized to conduct their own "risk-utility" balancing of RF emission levels for wireless telephones and to arrive at different conclusions as to what is "safe" or what constitutes

an "unreasonable" danger. App. 19a-20a. The Fourth Circuit decision thus would allow state courts to impose differing, state-specific "remedies," such as design, labeling, and equipment mandates for wireless telephones—including requirements, such as headset mandates, that have been expressly considered and rejected by the FCC. As Judge Kiser recognized in dissent, judicial acceptance of respondents' claims would "result in the complete invalidation of federal regulatory standards." App. 49a. This Court has repeatedly held that conflict preemption principles bar exactly this kind of state regulation. *See, e.g., Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000).

The Fourth Circuit panel reached a contrary result only by applying a legal standard fundamentally at odds with the decisions of this Court. In particular, the panel majority disregarded the preemptive force of the FCC's regulations, as if the comprehensive federal regulatory regime governing RF emissions did not exist, and instead searched for specific congressional authorization to displace state regulation. Not only has this Court rejected such a congressional "plain statement" rule, *see Geier*, 529 U.S. at 881 (2000); *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 548 (1992) (Scalia, J., concurring in part and concurring in the judgment), it is irreconcilable with congressional authority to delegate general rulemaking power to federal agencies against the backdrop of the Supremacy Clause.

The panel majority below also improperly applied a "presumption against preemption" despite this Court's nearly century long recognition that radio communications are uniquely federal and the FCC's assertion of "federal primacy" over regulation of technical standards for wireless telephony. App. 34a n.4. In the process, the Fourth Circuit purported to limit the principles recognized by this Court's decision in *United States v. Locke*, 529 U.S. 89 (2000), to the narrow context of maritime law. The net result of the Fourth

Circuit's analysis is that federal regulations are presumed to be subordinate to state law – unless Congress affirmatively states that every aspect of the federal regulatory regime that it intends to authorize will preempt unforeseen conflicting applications of state law.

In addition, the Fourth Circuit badly misread a critical provision of the Communications Act that establishes a clear jurisdictional divide between federal and state authority over wireless services. Entitled "State Preemption," 47 U.S.C. § 332(c)(3)(A) denies state and local governments "*any authority* to regulate the entry of . . . any commercial mobile service." 47 U.S.C. § 332(c)(3)(A) (emphasis added). Setting operational standards such as permissible RF emissions, and imposing design, equipment, or labeling duties as conditions precedent to distributing or using wireless telephones, are quintessential forms of entry regulation. In contrast to the Fourth Circuit, the Seventh Circuit has correctly read the statute to "create separate spheres of responsibility" and to reserve design and operational standards for all network components to the "exclusively federal" sphere. *Bastien v. AT&T Wireless Servs.*, 205 F.3d 983, 987 (7th Cir. 2000).

The Fourth Circuit's endorsement of a state common law broadside into the coherence and uniformity of federal radio regulation, standing alone, makes this case one of exceptional importance and worthy of this Court's plenary review. Both Congress and the FCC have repeatedly recognized that a reliable and seamless interstate wireless network is a national resource – essential to homeland security, public safety, and the economic health of this country. This Court's intervention is necessary to prevent the balkanization of network standards invited by the decision below, which will, if uncorrected, undermine the ability of consumers to use an FCC-approved wireless telephone in every state in the Union. For these reasons, discussed in detail below, this petition should be granted.

STATEMENT OF THE CASE

A. Factual Background

1. Federal Regulation Of Radio Transmissions

Regulation of radio transmissions has long been the responsibility of federal, not state, government. The Radio Act of 1912 first established a comprehensive federal licensing regime for commercial radio transmissions and "forbade the operation of radio apparatus without a license from the Secretary of Commerce and Labor." *NBC v. United States*, 319 U.S. 190, 210 (1943). Congress strengthened that regime in the Radio Act of 1927 in order "to maintain the control of the United States over all the channels of interstate and foreign radio transmission." Radio Act of 1927 § 1, 44 Stat. 1162 (1927). The 1927 Act created a new regulatory agency, the Federal Radio Commission, with the power to assign frequencies and regulate not only the power and duration of all radio transmissions but also the "apparatus to be used" for such transmissions. *Id.* § 4(e), 44 Stat. at 1163.

Congress built on the foundations of the 1927 Act in the Communications Act of 1934, which established the FCC and gave the agency plenary authority to regulate interstate and foreign radio communications. *See NBC*, 319 U.S. at 214. Section 301 of the 1934 Act reaffirmed the exclusive federal authority established by the 1927 Act: "No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio, . . . except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter." 47 U.S.C. § 301. Title III of the Act gave the FCC authority over every technical aspect of radio communication, including the power and time of operation, *id.* § 303(c), the location of stations or classes of stations, *id.* § 303(d), and "the kind of apparatus to be used *with respect to its external effects* and the purity and sharpness *of the emissions* from each station and from the apparatus therein," *id.* § 303(e) (emphases added).

2. The Advent Of Cellular Telephone Technology

Against this federal regulatory backdrop, commercial deployment of "cellular" radio telephone technology began in the late twentieth century. Such technology is designed to maximize the ability of multiple subscribers to use the same limited portion of radio spectrum without interference. By breaking a geographic area into "cells" and placing a base station in each cell, both the handsets and the base stations can use significantly less transmission power than they otherwise would. This allows more handsets to use the same set of radio frequencies within a given geographic area, by reducing the potential for interference between individual mobile units. *See* WILLIAM C.Y. LEE, *Mobile Communications Engineering: Theory and Applications* 6 (1982).

In a cellular system, each handset communicates with the base station that provides the best overall signal, and a call is automatically handed from base station to base station as the user's position in the network changes. *Id.* at 10. RF emissions provide the radio communications by carrying the signal from a transmitter to a receiver. *See FCC, OET, Questions and Answers about Biological Effects and Potential Hazards of RF Electromagnetic Fields*, Bulletin 56 at 3 (August 1999), *available at http://www.fcc.gov/oet/info/documents/bulletins/*. There is a direct correlation between any transmitter's signal strength and the amount of RF energy that the transmitter emits. *See id.* at 5. A wireless telephone is thus an integral part of the wireless network itself. Its power levels and ability to send and receive voice and data communications through RF emissions (as well as the ancillary signals necessary to other network functions) cannot be severed from network design as a whole. For example, the network's effective coverage area can only be defined in relation to the design and power levels of *both* the fixed antennae that serve as "base stations" *and* the portable transceivers contained in each subscriber's wireless

telephone. *See* THEODORE S. RAPPAPORT, *Wireless Communications – Principles and Practice* 17 (1996) ("RAPPAPORT").

At the inception of commercial two-way wireless telephony, the FCC recognized that all technical aspects of the service fall squarely within its plenary authority over all forms of interstate radio transmission under Title III of the Communications Act. *See Future Use of Frequency Band 806-960 MHZ*, 46 FCC 2d 752, 766-67, ¶44 (1974). The Commission made clear that its "technical standards and . . . operational rules are to apply nationwide . . . without regard to state boundaries or varying local jurisdictions." *Id.* at 766, ¶43. After initial deployments of wireless networks proved successful, the FCC revised its rules regarding cellular telephony and allocated additional spectrum to commercial mobile services. *See Use of the Bands 825-845 MHz and 870-890 MHz*, 86 FCC 2d 469 (1981). The Commission reaffirmed that the "essential objective" of its wireless policy was to "achieve nationwide compatibility," so that a subscriber could use a wireless telephone anywhere in the Nation. *Id.* at 503, ¶79. To that end, the Commission again "assert[ed] federal primacy over the areas of technical standards and competitive market structure for cellular service." *Id.* at 504-05, ¶82.

The FCC's reconsideration order in the first standard-setting docket for wireless devices explained that its technical standards were intended to be exclusive of competing state regulation. *See Use of the Bands 825-845 MHz and 870-890 MHz*, 89 FCC 2d 58, 66 ¶15 (1982) ("*1982 Cellular Order*"). The Commission emphasized that federal design and operational specifications were "carefully developed" in order to achieve "efficient spectrum re-use and nationwide compatibility, while providing sufficient flexibility to accommodate new technological innovations." *Id.* at 95, ¶81. The FCC identified national uniformity as a central component of federal wireless policy: "It is

imperative that no additional requirements be imposed by the states which could conflict with our standards and frustrate the federal scheme for the provision of nationwide cellular service." *Id.*

In 1993, Congress made significant amendments to the Communications Act in order to further consolidate wireless regulation at the federal level and thus "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." H. R. Rep. No. 103-111, at 260 (1993). In particular, the 1993 amendments added § 332(c)(3)(A), entitled "State Preemption," to the Communications Act Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 193-66, Title VI, § 6002(b), 107 Stat. 312 (1993) ("OBRA"). That provision provides, in pertinent part, that "no State or local government shall have *any authority* to regulate the entry of or rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3)(A) (emphasis added).

In addition, the OBRA amendments excluded wireless services from the traditional division between state and federal regulatory authority over "intrastate" versus "interstate" telecommunications services. *See e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 728-33 (1999). The OBRA amendments expressly removed wireless services from the reservation of state authority in 47 U.S.C. § 152(b)—negating any argument that there exists any "intrastate" component of wireless service presumptively subject to state control. In the FCC's words, this change was designed to ensure a "national regulatory policy for [wireless telephony], not a policy that is balkanized state-by-state." *Petition on Behalf of the State of Conn.*, 10 F.C.C.R. 7025, 7034, ¶14 (1995).

3. The FCC's RF Emissions Regulations

The FCC has long understood that, as the exclusive licensing agency for communications by radio, it bears the responsibility under federal law for evaluating and addressing any safety concerns raised by RF emissions from FCC-licensed devices. *See Biological Effects of Radiofrequency Radiation*, 100 FCC 2d 543, 543, ¶1 (1985) ("*Biological Effects of RF*"). Pursuant to its obligations under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4335, the Commission initiated its first inquiry into potential biological impacts of FCC-licensed devices in 1979. *Biological Effects of RF*, 100 FCC 2d at 544, ¶2. This proceeding resulted in the adoption of specific federal RF emission standards based on the research and recommendations contained in the 1982 report of the American National Standards Institute ("ANSI"). *Id.* at 551, ¶24. Many low power devices, including wireless telephones, were "categorical[ly] exclu[ded]" from NEPA obligations based upon the FCC's determination that the devices posed no RF dangers under normal conditions of use. *Id.* at 563, ¶58.

In 1993, the FCC opened the rulemaking that led to the regulations at issue in this case. The rulemaking was prompted by the FCC's desire to harmonize its RF regulations with new ANSI standards. The Commission specifically contemplated that the updated RF regulations would apply more broadly, to a whole range of FCC-regulated transmitters, including cellular telephones. *Guidelines for Evaluating the Envtl. Effects of Radiofrequency Radiation*, 8 F.C.C.R. 2849, 2851, ¶16 (1993) ("*RF NPRM*"). The FCC invoked its general regulatory authority under the Communications Act as grounds for promulgating this comprehensive RF emissions regulatory scheme, *id.* at 2854, ¶31; *see* 47 U.S.C. §§ 154(i)-(j), 303(r), as well as its "obligations under the NEPA . . . to provide the means by which to evaluate Commission actions with respect to

environmental significance," *RF NPRM*, 8 F.C.C.R. at 2854, ¶31 (citations omitted). As mandated by NEPA, the Commission solicited comments "from expert health and safety agencies within the Federal Government ... in the interest of developing a consistent approach to the treatment of RF exposure environments for the private sector and Federal Government." *Id.* at 2850, ¶ 11.

Three years later, while this rulemaking was still pending, Congress passed the Telecommunications Act of 1996 (the "1996 Act"), a sweeping, deregulatory reform of federal telecommunications policy. Section 704(b) of the 1996 Act, captioned "Radio Frequency Emissions," provided: "Within 180 days after the Enactment of this Act, the Commission shall complete action in [the 1993 rulemaking] to prescribe and make effective rules regarding the environmental effects of radio frequency transmissions." Pub. L. No. 104-204, § 704(b), 110 Stat. 56 (1996). This call for swift FCC action was based upon Congress's judgment that "it is in the *national interest* that *uniform, consistent requirements*, with adequate safeguards of the public health and safety, be established as soon as possible." H. R. Rep. No. 104-204, at 94 (I) (1995) (emphasis added). Congress knew that any such rules, by their nature, required the FCC to strike "an appropriate balance in policy" between "adequate safeguards of the public health and safety" and the "speed[y] deployment and the availability of competitive wireless telecommunications services." *Id.*

Consistent with this statutory directive, the FCC adopted the mandatory RF testing, certification, and emission standards at issue here so as "[t]o protect public health with respect to RF radiation from FCC-regulated transmitters." *Guidelines for Evaluating the Effects of Radiofrequency Radiation*, 11 F.C.C.R. 15123, 15184, ¶169 (1996) ("*RF Order I*"). The FCC's final rules balanced the competing national priorities identified by Congress in the passage of § 704(b). Indeed, the Commission characterized

its RF standards as reflecting a "balance between the need to protect the public . . . from exposure to potentially harmful RF electromagnetic fields and the requirement that the industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible." *Guidelines for Evaluating the Envtl. Effects of Radiofrequency Radiation*, 12 F.C.C.R. 13494, 13496, ¶2 (1997) ("*RF Order II*").

The Commission set maximum permissible exposure levels for every component of the wireless network capable of RF emissions, including handsets. *See RF Order I*, 11 F.C.C.R. at 15147, ¶63 ("The [RF emissions] limits we are adopting will generally apply to portable devices . . . [and include] hand-held cellular telephones."); 47 C.F.R. § 1.1307(b)(2) (regulating wireless "[m]obile and portable transmitting devices"); *id.* § 2.1093(b) (setting specific RF levels for portable transmitting devices "designed to be used . . . within 20 centimeters of the body of the user"). The FCC's RF regulations specify testing and exposure limits for the entire body, for any one cubic gram of human tissue, and for the hands, feet, and ankles. *See* 47 C.F.R. § 2.1093(d). These regulations, which have a fifty-fold safety factor built into authorized exposure limits, *see* Brief of the Respondents in Opposition at 3 n.4, *Citizens for the Appropriate Placement of Telecomms. Facilities v. FCC*, Nos. 00-393, 00-407, 00-417, 00-427 (U.S. Dec. 4, 2001) ("*FCC Brief in Citizens for Appropriate Placement*") are even more restrictive in some respects than the revised RF standards adopted by ANSI.

The FCC made pre-market RF testing and certification of wireless telephones a part of its equipment authorization process. Thus, no such telephone may be offered for sale or lease in the United States "unless . . . such device has been authorized . . . in accordance with [the RF regulations]." 47 C.F.R. § 2.803(a)(1). The Commission also incorporated compliance with RF requirements as a condition on the exercise of wireless service providers' federal spectrum

licenses. *See id.* § 24.51(a) ("Each transmitter utilized for operation under this part and each transmitter marketed, as set forth in § 2.803 of this chapter, *must be of a type that has been authorized by the Commission under its certification procedure for use under this part.*") (emphasis added).

As required by NEPA, *see* 42 U.S.C. § 4332(2)(C), the FCC consulted extensively with other federal agencies, including the FDA, the EPA, and OSHA. The FDA's participation was particularly important, given its overlapping regulatory authority "to protect the public health and safety from electronic product radiation." 21 U.S.C. § 360ii(a). The final RF emission standards "represent[ed] a consensus view of the federal agencies responsible for matters relating to the public health and safety." *RF Order I*, 11 F.C.C.R. at 15124, ¶2.

The FCC's RF standards were directly, but unsuccessfully, challenged in court. These challenges related not only to the Commission's authority to promulgate the standards, but also to the policy judgments made regarding the scientific evidence and the appropriate safety factor. *See EMR Network v. FCC*, 391 F.3d 269 (D.C. Cir. 2004) (affirming FCC denial of a petition to amend the RF rules to reduce authorized emission levels), *cert. denied*, 125 S. Ct. 2925; *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 90 (2d Cir. 2000) (rejecting argument that the RF standards are insufficiently protective in light of possible "non-thermal effects of RF radiation").

B. Proceedings Below

Respondents filed a complaint in Louisiana state court on May 26, 2000, which was removed to federal district court in Louisiana based on diversity of citizenship. This complaint (*Naquin*), as well as four other class action complaints filed in different state courts,[2] alleged that FCC-approved wireless

[2] The other four cases are *Pinney v. Nokia, Inc.*, No. 01-1456 (D. Md.), *Gimpelson v. Nokia, Inc.*, No. 01-1615 (N.D. Ga.), *Gilliam v. Nokia, Inc.*, No. 01-4275 (S.D.N.Y.), and *Farina v. Nokia, Inc.*, No. 01-2477 (E.D. Pa.).

telephones are defective products and unreasonably dangerous under the product liability and tort laws of their respective States. The five complaints named virtually the entire wireless industry, including most of the major manufacturers and service providers. Petitioners removed the *Naquin* case at issue here, and the four other state class action lawsuits, to the appropriate federal district courts. The Judicial Panel on Multidistrict Litigation consolidated the cases for pretrial proceedings in the U.S. District Court for the District of Maryland. *See In re: Wireless Litigation*, 170 F. Supp. 2d 1356 (J.P.M.L. 2001).

The gravamen of all five complaints, including that at issue here, is that scientific uncertainty exists regarding putative "non-thermal effects" of RF emissions. *See, e.g.*, Naquin Compl. ¶ XLI, App. 203a (alleging that "it was foreseeable that [wireless telephones] created some health risk and would or could cause some adverse health effect"). The complaints also alleged that petitioners misrepresented "[t]he presence of adequate testing of RFR," *id.* ¶ LIX.b, App. 209a, and "intentionally, negligently and wrongfully reported that the [wireless telephones] were safe," *id.* ¶ XLVIII, App. 206a.

According to respondents, the alleged risk that wireless telephones (which respondents acknowledge complied with all FCC testing and emission requirements) *might* cause *someone* injury is sufficient to require petitioners to include: (1) warnings that their phones are unsafe if used without a headset; (2) a headset with every telephone to reduce RF exposure of the brain and ear; and (3) instructions for the use of headsets. *Id.* ¶ CXXXI, App. 239a. Respondents specifically sought an injunction forcing petitioners to provide class members nationwide with headsets. Naquin Compl. ¶ CXXVIII, App. 236a. For class members whose wireless telephones were not compatible with a headset, respondents sought an injunction requiring petitioners to provide a new headset-compatible phone and a headset. *Id.*

After the district court denied respondents' motion to remand the four non-diversity cases, App. 77a-78a, petitioners filed a consolidated motion to dismiss all five complaints with prejudice on federal preemption grounds. The district court granted the motion, concluding that both respondents' theories of liability and their requested relief conflicted with the purposes and efficacy of the FCC's RF regulations. App. 64a-65a.

The district court held that the long and significant history of federal control of radio transmission and transmitters negated any possible presumption against federal preemption. App. 63a (citing *Locke*, 529 U.S. at 108). After carefully examining the entire regulatory scheme, including Section 332's express preemption provisions, the FCC's statements of purpose in its rulemaking proceedings, and the scope and operation of the federal RF regulations themselves, the district court concluded:

> [Respondents' claims] seek to have the responsible federal agencies' judgment overruled in several separate states by an individual judge or jury through compensatory and declaratory relief requiring the provision of headsets, instructions, and "reasons" the headsets should be used. Such a result is contrary to the Congressional purposes of national uniformity, deference to agencies' expertise, and striking an appropriate balance between wireless telecommunications development and public safety.

App. 73a.

A divided panel of the Fourth Circuit reversed. App. 4a, 46a. As an initial matter, the panel majority overturned the district court's holding that federal subject matter jurisdiction existed in four of the cases removed from state

court. App. 9a-29a. Because subject matter jurisdiction over *Naquin* rested on diversity of citizenship, however, the Fourth Circuit reached the merits of the federal preemption issue in this case. App. 29a.[3]

On the merits, the Fourth Circuit held that neither the claims at issue in this case nor the relief specifically sought, was preempted by federal law and hence reversed the district court's judgment of dismissal under Rule 12(b)(6) and reinstated the *Naquin* complaint. The majority began by invoking a "presumption against preemption" and emphasizing that this presumption is "particularly strong when Congress legislates in a field which the States have traditionally occupied, such as health and safety." App. 34a (internal quotation and citations omitted). The majority held that the district court's reliance on *Locke* was "misplaced because there is not the same federal presence in the wireless telecommunications area as there is in the area of maritime commerce." *Id.* at 34a-35a & n.4.

Applying this presumption in favor of state authority, the Fourth Circuit then held that the FCC's comprehensive regulatory regime did not preempt respondents' claims. According to the majority, the Commission could not preempt state law in the absence of clear "evidence" of "a congressional goal of achieving preemptive national RF radiation standards for wireless telephones." *Id.* at 43a. The majority failed to find any such "evidence" and further held

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[3] In four of the consolidated cases, *see* n. 2, *supra*, federal jurisdiction rested solely on federal question grounds. A separate group of petitioners has asked this Court to vacate and remand the Fourth Circuit's jurisdictional ruling in light of this Court's intervening decision in *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363 (2005). In the fifth case, which is at issue in this petition, federal jurisdiction also rested on diversity of citizenship, and the plaintiffs eventually amended their complaint to add a federal claim. *See* App. 237a. Thus, there is no dispute over subject matter jurisdiction in this case, and both the district court and the Fourth Circuit properly reached the merits of the federal preemption defense.

that the supposed absence of express preemption "counsel[ed] against" a finding of conflict preemption. *Id.*

The Fourth Circuit also held that § 332(c)(3)(A)'s ban on any form of state entry regulation did not preempt respondents' claims. The majority ruled that that the relief sought by respondents – "a headset requirement" – did not constitute "a barrier to entry for PCS providers." *Id. at* 40a. The majority asserted that because the wireless telephone was not part of the wireless network itself, and instead only served as a means of accessing the network, state regulation of the wireless telephones (as opposed to fixed antennae) could not violate § 332. *Id.* at 36a-40a.

Senior District Judge Kiser dissented from the panel's decision to remand four of the cases. *Id. at* 46a. He agreed with the district court that the federal RF regulations "reflect what the FCC believes will maintain the proper balance between the interest in promoting wireless communication throughout the country and the interest in protecting the health and safety of all consumers." *Id.* The dissent concluded that respondents' claims, by upsetting that balance, would "result in the complete invalidation of federal regulatory standards." *Id.* at 49a.

On April 12, 2005, the Solicitor General authorized the filing of an amicus brief by the United States expressing the FCC's view that the panel decision was wrong and should be reviewed by the full court. *Id.* at 184a. That same day, the Fourth Circuit denied rehearing *en banc, id.* at 130a, depriving the Fourth Circuit of the FCC's views regarding the preemptive effect of its own regulations.

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit Effectively Invalidated the Federal RF Regulatory Regime by Ignoring this Court's Precedent on Agency Conflict Preemption.

The Fourth Circuit's holding that state lawsuits may rebalance competing federal goals, re-evaluate expert findings and policy judgments made by federal agencies, and create different and conflicting obligations from those contained in federal standards designed to apply uniformly across the country, cannot coexist with settled principles of this Court's conflict preemption jurisprudence. App. 41a-45a. The decision will wreak havoc on the law of agency conflict preemption: It denies agency regulations any independent preemptive force under the Supremacy Clause and places Congress in a legislative straightjacket in crafting agency mandates where conflicts with state law *might* eventually arise.

Of most immediate concern, the decision below opens the door to a novel encroachment by state law into the technical and operational standards for interstate communications by radio. Not only will a patchwork of state standards undermine network reliability in general, it will threaten the ability of the wireless network to serve critical national security and public safety functions. As the FCC has recognized, "[t]he Homeland Security obligations of the Nation's public safety agencies make it imperative that their communications systems are robust and highly reliable." *Improving Pub. Safety Commc'ns in the 800 MHz Band*, 19 F.C.C.R. 14969, 14969, ¶1 (2004). Disparate state regulation of the design and RF emissions of portable wireless devices will adversely impact nationwide interoperability, the ability to "roam" outside a subscriber's designated network, and interstate public safety communications, as well as the new location technologies now being deployed as part of the FCC's wireless E911 initiative. *See* 47 C.F.R. § 20.18; *see also infra* n. 5.

1. Under the Supremacy Clause, U.S. Const. art. VI, sec. 2, federal law preempts all state law that stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000). Federal regulations are clearly "Laws of the United States" that can have independent preemptive effect under the Supremacy Clause. *See, e.g., Fid. Fed. Savs. & Loan v. de la Cuesta*, 458 U.S. 141, 152-54 (1982). Indeed, "[f]ederal regulations have no less preemptive effect than federal statutes." *Id.* at 153. Thus, the only relevant statutory inquiry in an agency preemption case is whether the agency was "acting within the scope of its congressionally delegated authority" by adopting the regulation at issue. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986); *see also Fid. Fed. Savs. & Loan*, 458 U.S. at 153-54; *United States v. Shimer*, 367 U.S. 374, 383 (1961). This Court has made quite clear that no special statement of congressional intent to preempt or to authorize the agency to preempt is necessary. *See, e.g., City of New York v. FCC*, 486 U.S. 57, 64 (1988).

The Fourth Circuit disregarded these bedrock preemption principles. According to the panel majority, the question here is not whether Congress has authorized the FCC to promulgate the regulations at issue, which it indisputably has, but rather whether Congress *itself* has expressly stated an "objective of achieving preemptive national RF radiation standards for wireless telephones." App. 42a-43a. Because, in the majority's view, no federal statute expressly preempts respondents' claims, no conflict preemption can arise from state interference with the governing federal regulatory regime: "The complete absence of any provision addressing wireless telephones counsels against a finding that § 332 evidences a congressional goal of achieving preemptive national RF radiation standards for wireless telephones." *Id.* at 43a.

This myopic focus on *congressional* action, rather than *agency* action, allowed the Fourth Circuit panel to "accord ... no weight," App. 28a, to the FCC's repeated statements

that its technical standards for all wireless devices must be exclusive in order to be effective: "It is imperative that *no additional requirements be imposed by the states* which could conflict with our standards and frustrate the federal scheme for the provision of nationwide cellular service." *1982 Cellular Order*, 89 FCC 2d at 95, ¶81 (emphasis added). The panel majority simply refused to examine agency intent, the legislative and regulatory background against which the federal RF standards were adopted, or the practical effect of disparate state regulation on the ability of federal regulations to achieve federal policy goals—factors that the district court found dispositive under this Court's precedents. App. 64a-72a.

The Fourth Circuit's approach to agency conflict preemption is flatly inconsistent with this Court's precedents. This Court has "emphasized that in a situation where state law is claimed to be pre-empted by federal regulation, a 'narrow focus on Congress' intent to supersede state law [is] misdirected.'" *City of New York*, 486 U.S. at 64 (quoting *Fid. Fed. Savs. & Loan*, 458 U.S. at 154). The majority effectively conflated express and implied preemption, making it essentially impossible to find the latter in the absence of the former. As this Court has explained, however, "conflict pre-emption is different in that it turns on the identification of 'actual conflict' and not an express statement of pre-emptive intent." *Geier*, 529 U.S. at 884 (citation omitted).

2. Had the panel majority asked the right question, it would have recognized that "[t]he answer" to whether respondents' state-law claims frustrate federal law is, as the district court concluded, "yes." App. 65a. That is so because respondents' claims "would necessarily require a judge and jury to usurp the regulatory function entrusted by Congress to the expertise and discretion of federal agencies." *Id.*

As the dissent pointed out, "[t]he FCC has enacted a uniform, nationwide regulatory scheme pertaining to wireless telephones which is the result of a thorough and complex rule-making process." *Id.* at 46a. In adopting the

federal RF emissions standards, the FCC struck a careful and deliberate balance between the goal of promoting the prompt and efficient roll-out of a seamless national wireless communications network and the potential health risks from exposure to RF emissions. *See supra* at 10-11.

If these state lawsuits are permitted to proceed, the FCC's detailed regulations regarding the testing of wireless telephones for RF emissions, 47 C.F.R. § 2.1093(d)(3); the authorized RF emission levels themselves, *id.* § 2.1093(d); resulting FCC certification; and "grant[s] of equipment authorization," *id.* § 2.803(a)(2), would all be rendered meaningless. Courts (and juries) applying state law would be free to conduct their *own* "risk-utility" balancing under various doctrines of product liability and tort law (or conduct no balancing at all), and thus effectively revoke the FCC's grant of equipment authorization to market a wireless telephone on a nationwide basis.[4]

These lawsuits thus constitute obstacles to the accomplishment of at least two federal objectives. The first is the existence of uniform national standards, which ensure that subscribers can seamlessly use their wireless telephones across the country. Both Congress and the FCC have repeatedly emphasized the need for national uniformity in the area of wireless telecommunications. *See supra* 7-11. When Congress passed § 704(b) it directed a national risk-utility analysis, based upon nationwide network concerns that lie beyond the ken of any individual state or state court. Many consumer products, such as lawnmowers or dishwashers, are purchased and used within the same state. A wireless telephone, by contrast, is part of an interstate network and intended to "roam" among the fifty states and

[4] Respondents' claims even contemplate that petitioners could be held liable for common law fraud for telling consumers that FCC-approved handsets are "safe." *See* App. 15a-16a. Ironically, the FCC and FDA make exactly this sort of statement in explaining their RF standards to the public. *See FCC/FDA—Market Sense, Cell Phones: Facts, Fiction, Frequency, available at www.fcc.gov/cgb/cell_phones.html* (asserting that "[a]ny cell phone at or below these [FCC-mandated] SAR levels (that is, any phone legally sold in the U.S.) is a 'safe' phone").

to provide reliable communications in every one of them. As with control of the authorized routes and flight times of aircraft traveling in federal airspace, *see City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), the maximum authorized speeds for interstate trains, *see CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993), or the design and crew requirements for interstate tankers, *Locke*, 529 U.S. at 110, uniformity of regulation is central to the achievement of the primary objective of federal regulation—seamless interstate operation.

The second relevant federal objective is achievement of the proper balance between potential health and safety concerns and the deployment of a reliable and seamless wireless infrastructure. Indeed, the Solicitor General has emphasized the FCC's exclusive role in striking this balance in briefs filed with this Court:

> There is a trade-off between [the goal of promoting the prompt and efficient roll-out of a national wireless telecommunications infrastructure] and public exposure to RF energy: all risk from RF energy could be eliminated by prohibiting wireless communications technologies. Congress has entrusted to the FCC the process of striking the appropriate balance, a subject squarely within the agency's expertise.

FCC Brief in Citizens for Appropriate Placement at 21. Yet, respondents' claims are premised on the theory that the FCC rules can be superseded by verdicts in state tort suits, which rebalance the same competing interests in arriving at new and different standards for RF emissions.

By their very nature, respondents' state-law claims seek to upset the balance struck by the FCC and replace it with a more "protective" regime. *See, e.g., Buckman*, 531 U.S. at 348 (finding obstacle preemption where "somewhat delicate balance of statutory objectives" could "be skewed by allowing" state-law claims); *Geier*, 529 U.S. at 881 (holding that a rule of state tort law that imposed a duty contrary to

the "mix" of options permitted by federal regulations is conflict-preempted); *Edgar v. MITE Corp.*, 457 U.S. 624, 634 (1982) (finding obstacle preemption where state law "upset the careful balance struck by Congress").

3. No "presumption against preemption" diminishes these conflicts with the federal regulatory regime. App. 34a n.4. Putting aside the fact that the federal presence in the area of RF regulation is substantial in both scope and longevity, *see supra* at 5-12, a presumption against federal authority has no place in an Article III court's assessment of the scope of an administrative agency's statutory mandate. *See, e.g., Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984); *Buckman*, 531 U.S. at 347-48. The very theory of the administrative state—Congressional delegation of legislative powers, with sufficient guidance, to an Executive agency—cannot be reconciled with any presumption against the scope of that authority. *New York v. FERC*, 535 U.S. 1, 18 (2002). Indeed, the fact that Congress has seen fit to centralize authority over certain subject matter in an expert federal agency, standing alone, suggests that a presumption in favor of state law is inappropriate. *See Geier*, 529 U.S. at 885 ("[O]ne can assume that Congress or an agency ordinarily would not intend to permit a significant conflict.").

The panel majority also erred, and acted in contravention of this Court's decision in *Geier*, by holding that the absence of express preemption creates a presumption against conflict preemption. *Compare* App. 42a-44a *with Geier*, 529 U.S. at 869-71. As *Geier* explained, Congress' inclusion of an express pre-emption clause "does *not* bar the ordinary working of conflict pre-emption principles." *Id.* at 869; *see also Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002) (quoting *Geier*, 529 U.S. at 869). Because Congress acts against a background presumption of conflict preemption, it need not (and should not be expected to) enact an express preemption clause in order to establish conflict preemption, and its inclusion of such a clause does not narrow the operation of conflict preemption. Here, as

in *Geier*, there is simply no reason why "Congress [would] not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake." 529 U.S. at 871.

4. The practical implications for the FCC and the wireless industry of the Fourth Circuit's ruling are daunting. The decision below places no apparent limits on the ability of a court, applying state law, to strike a new "risk-utility" balance, no matter how different from the one set by the FCC. Additional testing requirements, lower RF emissions standards, headsets, warning labels, metal shields, novel antenna designs, and even outright bans on certain handset configurations, for example, are all apparently within the new state authority over RF standards established by the court of appeals. Each state may now fashion its own trade-offs and adopt its own new RF standards without reference to the federal standards. Allowing fifty state court systems to arrive at their own respective definitions of RF safety and to implement those definitions through various new legal duties could negatively impact network coverage, roaming capabilities, and the deployment of new technologies designed to provide a consistent, predictable location service for E911 purposes.[5]

In fact, this is a case where both the theory of liability, *see supra* 18-22, and the proposed relief conflict with federal law. While the panel majority asserted that "a headset requirement would not stand as an obstacle to Congress's

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[5] In the Enhanced 911 context, when a customer makes such a call using a cellular phone, some carriers triangulate the position of the call using multiple cell sites in order to determine the customer's location and pass it on to public safety officials. *See* Dale N. Hatfield, *A Report on Technical and Operational Issues Impacting the Provision of Enhanced 911 Services*, at 10 (Nov.2002), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513296239. Reducing RF emissions can jeopardize this approach, because the weaker the handset's signal, the less likely it is that the signal will be received in at least three cell sites at a level sufficient to allow the caller's location to be determined. This concern applies particularly in rural areas, which tend to have lower cell site density.

goal of achieving nationwide coverage," App. 45a, that is unpersuasive for several reasons.

First, in a joint publication, the FCC and FDA have specifically stated that they do not believe that a headset requirement promotes RF safety. *See* FCC/FDA – *Cell Phone Facts: Consumer Information on Wireless Phones, available at http://www.fda.gov/cellphones/qa.html#6a* ("Since there are no known risks from exposure to RF emissions from wireless phones, there is no reason to believe that hands-free kits reduce risks."). Second, where a class member's wireless telephone is not headset-compatible, respondents seek injunctive relief requiring both a new wireless telephone and a headset. Third, the headset requirement must be accompanied by a statement regarding the use or recommended use of the headset in such a way as to avoid liability under respondents' theories, which, by definition, will require petitioners to tell consumers that FCC-approved wireless telephones are "unsafe" or "unreasonably dangerous." *See* Naquin Compl. ¶ CXXX, App. 237a (alleging that petitioners' public statements that FCC-approved phones "are safe" without a headset is a deceptive trade practice under federal law). This combination of requested relief would substantially alter the balance struck by the FCC and undermine public confidence in the safety of wireless communications.

This Court should not wait for the Fourth Circuit's erroneous decision to spawn a crazy quilt of state RF and wireless telephone design and equipment mandates. At the very least, this Court should call for the views of the Solicitor General, who authorized a brief supporting the petition for rehearing en banc in the Fourth Circuit but was unable to place the position of the United States and the FCC before that court. Given this Court's repeated recognition that the relevant federal agency's views on the issue of conflict preemption are entitled to substantial weight, *see, e.g., Geier*, 529 U.S. at 883; *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496-97, 498-99 (1996); *id.* at 505-06 (Breyer, J., concurring);

Hillsborough County, Florida v. Automated Medical Laboratories, 471 U.S. 707, 716-17 (1985), the views of the Solicitor General and the FCC are vital to the Court's consideration of this petition.

II. The Fourth Circuit Misread the Categorical Ban on State Entry Regulation in § 332(c)(3)(A), Creating a Conflict with the Seventh Circuit.

The Fourth Circuit also erred, and created a conflict with the Seventh Circuit, by holding that respondents' lawsuit is not expressly preempted by a federal statute that denies state and local governments "*any authority* to regulate *the entry* of . . . any commercial mobile service." 47 U.S.C. § 332(c)(3)(A) (emphasis added). The lower court ignored the plain language and purpose of the statute, improperly grafted an undefined "barrier to entry" test on the provision's flat ban on any form of entry regulation, and erroneously held that a wireless telephone is not part of the wireless network.

1. As with its analysis of agency conflict preemption, the panel majority began its examination of § 332(c)(3)(A) applying a presumption against preemption, which tainted the panel majority's entire analysis. App. 34a-35a & n.4. Although such a presumption may be appropriate in certain areas of traditional state regulation, *see, e.g., Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788 (2005); *Medtronic*, 518 U.S. at 485, this Court has made clear that it does *not* apply "when the State regulates in an area where there has been a history of significant federal presence," *Locke*, 529 U.S. at 108. As explained in detail above, *see supra* at 5-12, and as the district court correctly found, App. 62a-63a, the design and operational characteristics of radio transmitters has been an area of primary federal concern and control since the early twentieth century.

The Fourth Circuit attempted to distinguish *Locke* on the ground that "there is not the same federal presence in the wireless telecommunications area as there is in the area of maritime commerce," at issue in *Locke*. App. 34a n.4. To

the contrary, comprehensive federal regulation of wireless communications actually *predates* the federal maritime statutes at issue in *Locke*. 529 U.S. at 101 (Tank Vessel Act of 1936). As described above, Congress first established federal regulation over the technical aspects of all wireless communications in the Radio Acts of 1912 and 1927, swift on the heels of Marconi's first demonstrations of the wonders of "wireless telegraphy." The Communications Act of 1934 "formulated a unified and comprehensive regulatory system for the industry [and] the objectives of the legislation have remained substantially unaltered since 1927." *NBC*, 319 U.S. at 214; *see supra at* 5. If this long and comprehensive regulatory history does not constitute a "significant federal presence" in the regulation of technical aspects of wireless communication, then *Locke* has no meaning outside federal regulation of international tankers.[6]

2. Applying this "presumption," the panel majority interpreted Section 332(c)(3)(A) to apply only to "barriers" to entry and held that state regulation of a wireless telephone's RF emissions is not such a "barrier." App. 38a-40a. The relevant statutory provision, however, does not employ the term "barrier." Rather, the statute more broadly forbids the exercise of "*any* authority" to "regulate entry" in the context of commercial wireless service, 47 U.S.C. § 332(c)(3)(A) (emphasis added), regardless of the extent of the burden imposed by such regulation. The court below thus erred by asking whether the relief requested might create a "barrier" to entry, as opposed to inquiring whether the lawsuit seeks to "regulate the entry of ... any commercial

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[6] Other circuits have correctly read *Locke* to apply to areas such as railroad safety regulation, *see CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005), and the regulation of interstate communications by wire, *see Ting v. AT&T Corp.*, 319 F.3d 1126, 1136 (9th Cir. 2003). This petition provides the Court with a vehicle to address the confusion among the circuits as to when *Locke* applies and how its application affects implied preemption analysis.

mobile service" at all.[7] The Fourth Circuit's addition of a "barrier to entry" requirement to what was heretofore viewed as a categorical prohibition on certain state action—and a jurisdictional dividing line—is contrary to both the plain language of § 332(c)(3)(A) and congressional intent in enacting that provision.

The breadth of this language is underscored when considered in light of OBRA's amendment to 47 U.S.C. § 152(b). *See supra* at 8. Prior to that amendment, as this Court has explained, the Communications Act established "a system of dual state and federal regulation over telephone service," *La. Pub. Serv. Comm'n*, 476 U.S. at 360, with the FCC exercising plenary jurisdiction over "interstate . . . communications" and jurisdiction over "intrastate services" reserved to state public utility commissions, *id.* Indeed, the holding of *Louisiana* was that Section 152(b) deprived the FCC of authority to preempt state regulation of depreciation rates for intrastate services. *Id.* at 379.

In 1993, Congress decided to *exclude* wireless services from Section 152(b), and thus to remove such services from the sphere of intrastate jurisdiction. Congress thereby evinced its intent to exempt wireless carriers from the type of regulation state commissions had imposed on wireline carriers (*i.e.*, carriers offering telecommunications over wired networks). The amendment to Section 152(b) also

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[7] Other parts of the Communications Act, in contrast, do mandate that a particular state or local action actually operate as a barrier to a carrier's ability to provide service. *See, e.g.*, 47 U.S.C. § 253(a) ("Removal of *Barriers to Entry* . . . No State or local statute or regulation, or other State or local legal requirement, may prohibit *or have the effect of prohibiting the ability of any entity to provide* any interstate or intrastate telecommunications service." (emphasis added)); *id.* § 332 (c)(7)(B)(II) (state or local regulation of personal wireless service facilities "shall not prohibit *or have the effect of prohibiting the provision of* personal wireless services") (emphasis added). These provisions demonstrate that Congress knows full well how to draft a statute that preempts only state regulation that can be shown to actually impede the provision of a telecommunications service. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002).

represents a congressional judgment that wireless services have no intrastate component for the States to regulate. The reference to entry regulation in Section 332(c)(3)(A), then, is best construed as a term of art referencing all forms of regulation over equipment and services that state commissions had imposed on wireline telephone companies. *See id.* at 372 (explaining that "technical terms of art should be interpreted by reference to the trade or industry to which they apply"). By ignoring this background and context of Section 332(c)(3)(A), the Fourth Circuit ignored congressional intent and authorized state entry regulation as long as it does not run afoul of an undefined "barrier to entry" test.

The Fourth Circuit's exclusion of the wireless handset from the protection of § 332(c)(3)(A) was also plainly wrong. *See* App. 40a ("A headset requirement for wireless telephones would not constitute a barrier to entry into the [mobile commercial services] market because wireless telephones are only used to access a wireless service provider's network of coverage; the telephones themselves do not provide the actual coverage."). As explained above, in two-way radio communications, the coverage of the network is defined *both* by the power, design, and placement of the base station transmitter *and* by the power and design of the antenna and transceiver in the handset. *See* RAPPAPORT at 17. A given set of base stations may provide seamless coverage for one handset design, but may provide wholly inadequate coverage for another handset with a different antenna or operating at lower power. Particularly in rural areas, lower handset signal strength could mean that the handset loses contact with one base station before the call can be handed off to another base station. Unless there is some set level of RF emissions from wireless handsets, the network (including the telephone itself) is useless.

The FCC's own regulations underscore that the wireless telephone is a transmitter that is part of the carrier's wireless network. Subscribers' mobile stations "when receiving service from [a] cellular system, are considered to be

operating under the authorization of that cellular system," and thus "[c]ellular system licensees *are responsible for exercising effective operational control over mobile stations receiving service through their cellular systems.*" 47 C.F.R. § 22.927 (emphasis added). The integral nature of the handset is also shown by the fact that in wireless networks, "the power levels transmitted by every subscriber unit are under constant control by the serving base stations," RAPPAPORT at 17, which can and do adjust the power outputs of the handsets in order to ensure that each handset transmits the smallest amount of power necessary to maintain a quality link.

Technical mandates for equipment design and configuration, pre-market testing and labeling requirements are all *quintessential* forms of entry regulation. As the FCC has made clear, state certification regimes that include "engineering standards, inspections and tests, service quality standards, and safety requirements" are "precluded by the provision in amended Section 332 that categorically preempts state and local entry regulation." *Petition on Behalf of the State of Haw. Pub. Util. Comm'n for Auth. To Extend Its Rate Regulation of Commercial Mobile Radio Servs. in the State of Haw.*, 10 F.C.C.R. 7872, 7880, ¶37 n. 120 (1995) (citing H. R. Rep. No. 103-111, 103rd Cong., 1st Sess. 261 (1993)).

3. The Fourth Circuit's engrafting of a "barrier to entry" requirement onto Section 332(c)(3)(A) conflicts with the Seventh Circuit's decision in *Bastien*. *Bastien* held that Section 332(c)(3)(A) preempted a state tort action alleging that a cellular service provider "misled [the plaintiff] about his cellular telephone service." 205 F.3d at 984. As the Seventh Circuit explained, the complaint challenged "the modes and conditions under which AT&T Wireless may begin offering service in the Chicago market." *Id.* at 989. Because "[t]he statute makes the FCC responsible for determining the number, placement and operation of the cellular towers and other infrastructure," granting the plaintiff relief "would necessarily force AT&T Wireless to do more than required by the FCC: to provide more towers, clearer signals or lower rates." *Id.* "The statute," however, "specifically insulates these FCC decisions from state court review." *Id.* The plaintiff in *Bastien* (like

respondents here) was engaged in a "transparent attempt to recast federal claims [challenging the FCC regulations] as state law fraud and breach of contract actions." *Id.*[8]

Just as a challenge to the number of base stations in a coverage area constitutes forbidden entry regulation, so too does state regulation based upon the wireless handset's RF emissions to a base tower, particularly given that the design and signal strength of both parts of the network are completely interdependent. To regulate one is to regulate the other—and regulatory authority over different parts of the network cannot practically be divided between the FCC and the fifty states.

Accordingly, respondents' lawsuits are preempted not only by the FCC's comprehensive regulation of RF testing and emissions, but also by the express preemption of "entry" regulation contained in § 332(c)(3)(A). The Fourth Circuit badly misread the preemptive scope of § 332(c)(3)(A) in its own right, and then used its erroneous conclusion regarding statutory preemption to buttress its rejection of agency conflict preemption. Because the questions presented are interrelated, and because the Fourth Circuit's treatment of § 332(c)(3)(A) conflicts with the Seventh Circuit's analysis in *Bastien*, this Court should grant certiorari on both questions presented by this petition.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

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[8] The *Bastien* court also correctly rejected the "savings clause" argument relied upon by the court below. *Compare Bastien*, 205 F.3d at 987, *with* App. 44a. As the Seventh Circuit explained, "[t]o read the [saving] clause expansively would abrogate the very federal regulation of mobile telephone providers that the act intended to create." 205 F.3d at 987. Rather, "[t]he two clauses read together create separate spheres of responsibility, one exclusively federal and the other allowing concurrent state and federal regulation." *Id; see also AT&T Corp. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998) (reasoning that savings clause "cannot in reason be construed as continuing in customers a common law right . . . which would be absolutely inconsistent with the provisions of the act.") (internal quotation omitted).

Respectfully submitted.

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED MARCH 16, 2005

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 03-1433

J. DOUGLAS PINNEY, M.D.; PATRICIA S. COLONELL, individually and on behalf of all others similarly situated; FRANCIS J. FARINA, individually and on behalf of all those similarly situated; GARRETT J. NAQUIN; RONALD LEBLANC; JUDITH A. KAUFMAN; ASHER RUBENSTEIN; CRYSTALL GILLIAM; DIMITRI MACK; RIEDY GIMPELSON, individually and on behalf of all others similarly situated; SARAH DAHLGREN, on behalf of herself and all others similarly situated; LINDA BARRELL; BLAYNE MINOGUE; BRIAN LANE BARRETT; DIANA BARRETT; DAVID C. KELLER; MARSHA L. KELLER,

Plaintiffs-Appellants,

v.

NOKIA, INCORPORATED, a/k/a Nokia Mobile Phones, Incorporated, a/k/a Nokia Corporation; NEC AMERICA, INCORPORATED; ERICSSON WIRELESS COMMUNICATIONS, INCORPORATED, a/k/a Ericsson, Incorporated; Sprint PCS LIMITED PARTNERSHIP, a/k/a Sprint PCS, a/k/a Sprint Spectrum, LLP, a/k/a Sprint Spectrum; AUDIOVOX COMMUNICATIONS CORPORATION; NEXTEL COMMUNICATIONS, INCORPORATED, a/k/a Nextel Communications of the Mid-Atlantic, Incorporated, a/k/a Nextel Partners, Incorporated, a/k/a Nextel; MATSUSHITA

Appendix A

CORPORATION OF AMERICA, a/k/a Panasonic Corporation; PHILIPS ELECTRONICS NORTH AMERICA CORPORATION; QUALCOMM INCORPORATED; SAMSUNG ELECTRONICS AMERICA, INCORPORATED, A/K/A SAMSUNG ELECTRONICS; SANYO NORTH AMERICA, INCORPORATED, a/k/a Sanyo Business Systems Corporation, a/k/a Sanyo North America Group; SONY ELECTRONICS, INCORPORATED; AT & T CORPORATION, a/k/a AT & T; VERIZON MARYLAND, INCORPORATED, a/k/a Verizon, a/k/a Verizon Wireless, formerly known as Bell Atlantic Maryland, Incorporated; VERIZON COMMUNICATIONS, INCORPORATED, formerly known as Bell Atlantic Corporation; VERIZON WIRELESS, a/k/a NYNEX, a/k/a Bell Atlantic NYNEX, a/k/a Bell Atlantic Mobile, Incorporated, a/k/a Bell Atlantic NYNEX Mobile; CELLCO PARTNERSHIP, d/b/a Verizon Wireless, formerly known as Bell Atlantic NYNEX Mobile, formerly known as Bell Atlantic Mobile; CINGULAR WIRELESS, LLC, formerly known as BellSouth Mobility, Incorporated, a/k/a Southwestern Bell Wireless, formerly known as Southwestern Bell Mobile Systems, Incorporated; CINGULAR WIRELESS, a/k/a Washington/Baltimore Cellular Limited Partnership; SBC COMMUNICATIONS, INCORPORATED; CELLULAR ONE GROUP, a/k/a Cellular One; VOICESTREAM WIRELESS CORPORATION; C.E.I., INCORPORATED, a/k/a Communications Electronics, a/k/a Communications Electronics, Incorporated; BALTIMORE BUSINESS COMMUNICATIONS, INCORPORATED; COMCAST/METROPHONE; RADIOFONE; POWERTEL, INCORPORATED; POWERTEL PCS, INCORPORATED; POWERTEL/ATLANTA, INCORPORATED; MITSUBISHI WIRELESS COMMUNICATIONS, INCORPORATED; MOTOROLA, INCORPORATED, a Delaware corporation; CELLULAR TELECOMMUNICATIONS AND INTERNET ASSOCIATION, a District of Columbia corporation; CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION; TELECOMMUNI-

Appendix A

CATIONS INDUSTRY ASSOCIATION, a/k/a TIA; NEXTEL PARTNERS OPERATING CORPORATION,

Defendants-Appellees,

and

WESTINGHOUSE COMMUNICATIONS; SOUTHERN TELECOM, INCORPORATED, a/k/a Southern Linc; JOHN DOES 1-100; LGIC CORPORATION; PANASONIC CORPORATION; SAMSUNG SDI COMPANY; SANYO CORPORATION; SONY CORPORATION; PLANET CELLULAR COMMUNICATIONS, INCORPORATED; VISITOR CELLULAR L.L.C.; BELL SOUTH MOBILITY; KYOCERA WIRELESS CORPORATION; MCI WORLDCOM COMMUNICATIONS, INCORPORATED; U.S. WEST WIRELESS, L.L.C., A Colorado corporation; U.S. WEST COMMUNICATIONS, INCORPORATED, a Colorado corporation; GTE MOBILNET OF SAN DIEGO, INCORPORATED, a Delaware corporation; GTE WIRELESS SAN DIEGO, LLC, a California Limited Liability; CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA, a California corporation; AB CELLULAR HOLDINGS, LLC, d/b/a LA Cellular, d/b/a Los Angeles Cellular Telephone Company,

Defendants.

Argued: October 1, 2004

Decided: March 16, 2005

Before LUTTIG and MICHAEL, Circuit Judges, and Jackson L. KISER, Senior United States District Judge for the Western District of Virginia, sitting by designation.

Appendix A

OPINION

MICHAEL, Circuit Judge:

This multidistrict litigation includes five class actions brought initially in the state courts of Georgia, Louisiana, Maryland, New York, and Pennsylvania. The plaintiffs sue Nokia Inc. and other entities (collectively, "Nokia") involved in the manufacture and sale of wireless telephones. The plaintiffs claim that wireless telephones emit an unsafe level of radio frequency radiation and that Nokia has hidden this fact from consumers. Nokia removed the five cases to various federal courts, and the Judicial Panel on Multidistrict Litigation (JPML) transferred the cases to the United States District Court for the District of Maryland (the district court) for consolidated pretrial proceedings. The district court denied the plaintiffs' motion to remand four of the cases to state court and then dismissed all five cases on the ground that the plaintiffs' state law claims are preempted by the Federal Communications Act of 1934 (FCA), 47 U.S.C. § 151 *et seq.* The plaintiffs appeal both rulings. Because federal subject matter jurisdiction is lacking in four of the cases, we reverse the district court's order denying the motion to remand those cases. There is diversity jurisdiction over the fifth case, and because the state law claims are not preempted, we reverse the order dismissing that case.

I.

A wireless telephone (commonly called a cell phone) is actually a radio containing a low power transmitter. When a wireless telephone is turned on, it searches for a base station

(usually a tower) within range. A base station is a fixed transmitter containing antennae and electronic equipment that communicates with the transmitter in a wireless telephone. If a wireless telephone finds a base station within range, the telephone identifies itself by transmitting its Mobile Identification Number (MIN), its System Identification Code (SID), and its Electronic Serial Number (ESN). The ESN is a number permanently programmed into the telephone when it is manufactured. The SID and the MIN are programmed into the wireless telephone when a customer purchases a service plan and the telephone is activated. The base station relays the identifying information (MIN, SID, and ESN) to the local mobile telephone switching office (MTSO), which confirms that the telephone is assigned to a valid customer. An MTSO is a sophisticated computer that controls all of the base stations in a particular area for the purpose of coordinating radio transmissions to and from wireless telephones. Once an MTSO confirms that a wireless telephone is assigned to a valid customer, the MTSO assigns a frequency on which the user may communicate.

Base stations receiving and routing transmissions from wireless telephones have a relatively small transmission range because they have low power transmitters. Accordingly, to provide continuous wireless telephone service coverage over an extended area, numerous base stations must be built. Cities and regions are divided into cells, typically ten square miles, each containing a base station. As a user moves out of one cell (and thus out of range of the base station in that cell) and into an adjoining cell, the MTSO hands the signal off to the base station in the adjoining cell.

Appendix A

Marshall Brain & Jeff Tyson, *How Cell Phones Work*, *at* http://www.howstuffworks.com/cell-phone.htm/printable (last visited January 24, 2005).

Wireless telephones emit a low level of radio frequency (RF) radiation, a form of electromagnetic energy, from their antennae when they communicate with base stations. *See Cell Phone Facts: Consumer Information on Wireless Phones*, *at* http://www.fda.gov/cellphones/qa.html (last updated July 29, 2003). While it is well established that exposure to high levels of RF radiation can cause adverse health effects, there is no scientific consensus on the effects of low level exposure. The Federal Communications Commission (FCC) requires all transmitters that emit RF radiation to be authorized by the agency before they are marketed or sold. *See* 47 C.F.R. §§ 2.801, 2.803 (2004). Pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*, which requires agencies to consider the impact of their actions on the quality of the human environment, the FCC has promulgated rules that limit the amount of RF radiation that FCC-regulated transmitters (including wireless telephones) may emit. *In re Guidelines for Evaluating the Envtl. Effects of Radiofrequency Radiation*, 11 FCC Rcd. 15123, 15125 (1996) (*In re Guidelines*); *see* 47 C.F.R. §§ 1.1307, 1.1310, 2.1091, 2.1093.

The plaintiffs brought five class actions in state courts against Nokia, claiming, among other things, that (1) wireless telephones emit an unsafe level of RF radiation and (2) Nokia, in knowing this, negligently and fraudulently endangered the consuming public by marketing wireless telephones without headsets. According to the plaintiffs, they were exposed to

the risk of adverse biological effects from the RF radiation emitted by their wireless telephones when they used the telephones without headsets. The plaintiffs purport to represent wireless telephone users who have not been diagnosed with brain- or eye-related diseases and who were not provided headsets when they leased or bought their wireless telephones. Compensatory damages are sought in an amount sufficient to buy a headset for each class member who lacks one and to reimburse each class member who has already bought one. For class members with wireless telephones that are not headset-compatible, an injunction is sought to require Nokia to provide them with telephones that can be used with a headset. The plaintiffs also seek punitive damages, costs, and attorneys' fees.

After these cases were filed in the five state courts, Nokia removed them, pursuant to 28 U.S.C. § 1447, to the five appropriate federal district courts. On October 31, 2001, the JPML transferred the five cases to the District of Maryland for consolidated or coordinated pre-trial proceedings. On January 7, 2002, the plaintiffs in four of the cases — those with lead plaintiffs named Pinney, Farina, Gilliam, and Gimpelson (collectively, the "Pinney plaintiffs") — filed a consolidated motion to remand their cases to the state courts in which they originated. The plaintiffs in the fifth case (the "Naquin plaintiffs") did not join this motion because there was federal subject matter jurisdiction over their case based on diversity of citizenship. On June 21, 2002, the district court denied the Pinney plaintiffs' motion to remand on the ground that their claims necessarily depend on the resolution of a substantial federal question. According to the

district court, the claims are a disguised attack on the FCC's RF radiation standards, and resolution of the claims would require the court to rule on the validity of those standards.

After remand was denied, Nokia filed a consolidated motion to dismiss for failure to state a claim, *see* Fed.R.Civ.P. 12(b)(6), on the ground of federal preemption. On March 5, 2003, the district court granted Nokia's motion on the basis that the plaintiffs' claims are pre-empted by the FCA. More specifically, the district court concluded that the relief sought by the plaintiffs in all five cases conflicts with Congress's goal of achieving national uniformity in RF radiation emission levels for all wireless telecommunications equipment. The plaintiffs appeal the district court's orders.

II.

We turn first to the district court's order denying the Pinney plaintiffs' consolidated motion to remand their four cases to state court. Federal removal jurisdiction may be exercised over state court actions "of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). The original jurisdiction of the district courts includes jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The propriety of Nokia's removal of the Pinney plaintiffs' state court cases depends on whether the claims "aris[e] under" federal law. *See Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir.1994). We must strictly construe our removal jurisdiction because removal "raises significant federalism concerns." *Id.* "If it appears before final judgment that a case was not properly

removed, because it was not within the original jurisdiction of the United States district courts, the district court must remand it to the state court from which it was removed." *Franchise Tax Bd. of Cal. v. Constr. Laborer's Vacation Trust*, 463 U.S. 1, 8, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983) (citing 28 U.S.C. § 1447(c)).

We begin with the issue of whether the Pinney plaintiffs' claims arise under federal law pursuant to the substantial federal question doctrine. We then address whether their claims arise under federal law pursuant to the doctrine of complete preemption. We ultimately conclude that the claims of the Pinney plaintiffs do not arise under federal law by reason of either doctrine. Accordingly, the district court lacked jurisdiction over these claims, and the court erred in denying the Pinney plaintiffs' consolidated motion to remand their cases to state court.

A.

In determining whether a plaintiff's claim arises under federal law, we apply the well-pleaded complaint rule, which holds that courts "ordinarily . . . look no further than the plaintiff's [properly pleaded] complaint in determining whether a lawsuit raises issues of federal law capable of creating federal-question jurisdiction under 28 U.S.C. § 1331." *Custer v. Sweeney*, 89 F.3d 1156, 1165 (4th Cir. 1996). Thus, in examining the complaint, our first step is to "discern whether federal or state law creates the cause of action." *Mulcahey*, 29 F.3d at 151; *see also Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir.2004) ("The vast majority of lawsuits 'arise under the law that creates the cause

of action.' ") (quoting *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260, 36 S.Ct. 585, 60 L.Ed. 987 (1916)). If federal law creates a plaintiff's claim, then removal is proper. *Mulcahey*, 29 F.3d at 151. The general rule, of course, is that a plaintiff is the "master of the claim," and he may "avoid federal jurisdiction by exclusive reliance on state law" in drafting his complaint. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). Here, it is undisputed that state law creates the claims asserted by the Pinney plaintiffs, but this does not end our inquiry. We must also determine whether these cases fall within the small class of "cases in which a well-pleaded complaint establishes . . . that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law, in that federal law is a necessary element of one of the well-pleaded . . . claims." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988) (quoting *Franchise Tax Bd.*, 463 U.S. at 13, 27-28, 103 S.Ct. 2841) (internal quotation marks and citations omitted). Under the substantial federal question doctrine, "a defendant seeking to remove a case in which state law creates the plaintiff's cause of action must establish two elements: (1) that the plaintiff's right to relief necessarily depends on a question of federal law, and (2) that the question of federal law is substantial." *Dixon*, 369 F.3d at 816. If the defendant fails to establish either of these elements, the claim does not arise under federal law pursuant to the substantial federal question doctrine, and removal cannot be justified under this doctrine. *Id.*

A plaintiff's right to relief necessarily depends on a question of federal law when "it appears that some . . . disputed question of federal law is a necessary element of one of the well-pleaded state claims." *Franchise Tax Bd.*, 463 U.S. at 13, 103 S.Ct. 2841. If a plaintiff can establish, without the resolution of an issue of federal law, all of the essential elements of his state law claim, then the claim does not necessarily depend on a question of federal law. *See id.* at 13-14, 103 S.Ct. 2841; *see also Dixon*, 369 F.3d at 817 ("[I]f the plaintiff can support his claim with even one theory that does not call for an interpretation of federal law, his claim does not 'arise under' federal law for purposes of § 1331."). This principle is illustrated in *Franchise Tax Board.* There, the Supreme Court found no substantial federal question when a California tax agency attempted to enforce a levy on funds held in trust for several taxpayers under an ERISA-covered benefit plan. 463 U.S. at 13-14, 103 S.Ct. 2841. The claim did not necessarily depend on a resolution of federal law because "California law establishe[d] a set of conditions, without reference to federal law, under which a tax levy may be enforced; federal law bec[ame] relevant only by way of a defense to an obligation created entirely by state law, and then only if [the state agency] ha[d] made out a valid claim for relief under state law." *Id.* at 13, 103 S.Ct. 2841. "[I]t has been well-settled law," the Court noted, "that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Id.* at 14, 103 S.Ct. 2841.

Appendix A

We now examine the claims in the complaints filed by the Pinney plaintiffs. We note parenthetically that the district court allowed these plaintiffs to amend their complaints after it denied their motion to remand. Because amendment occurred after removal, we look at the original complaints rather than the amended complaints in determining whether removal was proper. *See Pullman Co. v. Jenkins*, 305 U.S. 534, 537, 59 S.Ct. 347, 83 L.Ed. 334 (1939). The Pinney plaintiffs assert seven claims in their original complaints. They first allege that Nokia is strictly liable for placing a defectively designed product into the stream of commerce. These claims are brought under the laws of Georgia, Maryland, New York, and Pennsylvania. Under the laws of all four states, a manufacturer (and sometimes a seller) is strictly liable for selling a defectively designed product that causes personal injury. Georgia, Maryland, and New York assess whether a product suffers from a design defect by using the risk-utility balancing test. Under this test a fact-finder must determine whether the manufacturer acted reasonably in choosing a particular product design, given the probability and magnitude of the risk, the usefulness of the product in its particular condition, and the burden on the manufacturer to eliminate the risk. *See Banks v. ICI Ams., Inc.*, 264 Ga. 732, 450 S.E.2d 671, 673-74 (1994); *Nissan Motor Co. v. Nave*, 129 Md.App. 90, 740 A.2d 102, 118 (1999); *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102, 463 N.Y.S.2d 398, 450 N.E.2d 204, 208-09 (1983). Under Pennsylvania law a product suffers from a design defect if it lacks a component necessary to make it safe for its intended use. *See Harsh v. Petroll*, 840 A.2d 404, 416-17 (Pa.2003).

Second, the Pinney plaintiffs allege that Nokia is strictly liable for its failure to warn about the adverse health risks associated with wireless telephones. These claims are brought under the laws of Georgia, Maryland, New York, and Pennsylvania. According to these laws, when a manufacturer or a seller knows or should have known of the latent danger of a product and fails to warn the consuming public, the manufacturer or seller is strictly liable for injuries caused by the danger while the product is used in a foreseeable manner. *See Hunt v. Harley-Davidson Motor Co.*, 147 Ga.App. 44, 248 S.E.2d 15, 16 (1978); *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 601 A.2d 633, 639 (1992); *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 582 N.Y.S.2d 373, 591 N.E.2d 222, 225 (1992); *Davis v. Berwind Corp.*, 547 Pa. 260, 690 A.2d 186, 190 (1997).

Third, the Pinney plaintiffs allege that Nokia is liable for violating various state consumer protection statutes. These claims are brought under the laws of Maryland, New York, and Pennsylvania, where the relevant statutes allow a plaintiff to recover for losses or injuries sustained when a merchant engages in deceptive trade practices. *See* Md.Code Ann., Com. Law II, § 13-408; N.Y. Gen. Bus. Law § 349(h) (McKinney); 73 Pa. Cons.Stat. § 201-9.2. These statutes generally require a plaintiff to prove either (1) that the defendant made materially false or misleading statements about its product that deceived, or had the tendency to deceive, consumers, or (2) that the defendant failed to state a material fact with respect to its product, and this failure deceived, or had the tendency to deceive, consumers. *See* Md.Code Ann., Com. Law II, § 13-301(1), (2)(i), (3),

(9)(i); N.Y. Gen. Bus. Law § 350-a(1); 73 Pa. Cons.Stat. § 201-2(4)(v), (vii), (ix), (xxi).

Fourth, the Pinney plaintiffs allege that Nokia breached an implied warranty of merchantability by selling and distributing unreasonably dangerous wireless telephones. These claims are brought under the laws of Georgia, Maryland, New York, and Pennsylvania. To make out a claim for breach of this implied warranty, a plaintiff must establish that a product is not of merchantable quality and that he suffered an injury as a result. A product is not of merchantable quality when it is not fit for the ordinary purposes for which it is used. *See Wilson v. J & L Melton, Inc.*, 270 Ga.App. 1, 606 S.E.2d 47, 49 n. 1 (2004); *Ford Motor Co. v. Gen. Acc. Ins. Co.*, 365 Md. 321, 779 A.2d 362, 370 n. 13 (2001); *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 639 N.Y.S.2d 250, 662 N.E.2d 730, 736 (1995); *Phillips v. Cricket Lighters*, 852 A.2d 365, 370-71 (Pa.Super.Ct.2004). In determining whether a product is of merchantable quality, the fact-finder focuses on the "expectations for the performance of the product when used in the customary, usual, and reasonably foreseeable manners." *Denny*, 639 N.Y.S.2d 250, 662 N.E.2d at 736.

Fifth, the Pinney plaintiffs allege that Nokia was negligent (1) in failing to conduct adequate and appropriate scientific research on the adverse health effects of exposure to RF radiation from wireless telephones, (2) in misrepresenting to the public that wireless telephones are safe, (3) in suppressing any scientific evidence suggesting that wireless telephones are not safe, (4) in failing to provide warnings about the potential health risks from failing to use a headset,

and (5) in failing to provide headsets and instructions encouraging their use. These claims are brought under the laws of Georgia and Maryland. To make out a claim for negligence, a plaintiff must establish the following elements: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the plaintiff suffered an injury, and (4) there was a causal connection between the breach and the injury. *See Johnson v. Am. Nat'l Red Cross*, 276 Ga. 270, 578 S.E.2d 106, 108 (2003); *Hemmings v. Pelham Wood LLP*, 375 Md. 522, 826 A.2d 443, 451 (2003). A manufacturer generally has a duty to exercise reasonable care in manufacturing, designing, and selling its products "so as to make the products reasonably safe for intended or foreseeable uses." *Chrysler Corp. v. Batten*, 264 Ga. 723, 450 S.E.2d 208, 211 (1994) (citation omitted); *see also Eagle-Picher Indus., Inc. v. Balbos*, 326 Md. 179, 604 A.2d 445, 454 n. 9 (1992).

Sixth, the Pinney plaintiffs allege that Nokia engaged in fraud by misinforming and misleading the public as to the safety of wireless telephones. These claims are brought under the laws of Georgia, Maryland, New York, and Pennsylvania. To make out a claim for fraud, a plaintiff must establish the following elements: (1) the defendant made a false representation, (2) the defendant knew the representation was false or was recklessly indifferent to its truth or falsity, (3) the defendant made the representation with the intent to defraud the plaintiff, (4) the plaintiff justifiably relied on the false representation, and (5) the plaintiff suffered damages as a result. *See Rhone v. Bolden*, 270 Ga.App. 712, 608 S.E.2d 22 (2004); *Martens Chevrolet, Inc. v. Seney*, 292 Md. 328, 439 A.2d 534, 537 (1982); *P. Chimento Co. v. Banco Popular*

de Puerto Rico, 208 A.D.2d 385, 617 N.Y.S.2d 157, 158 (N.Y.App.Div.1994); *Gibbs v. Ernst*, 538 Pa. 193, 647 A.2d 882, 889 (1994). Concealment of a material fact, with intent to deceive, satisfies the false representation element of fraud. *See Paul v. Destito*, 250 Ga.App. 631, 550 S.E.2d 739, 744 (2001); *Hoffman v. Stamper*, 155 Md.App. 247, 843 A.2d 153, 186 (2004); *Nasaba Corp. v. Harfred Realty Corp.*, 287 N.Y. 290, 39 N.E.2d 243, 245 (1942); *De Joseph v. Zambelli*, 392 Pa. 24, 139 A.2d 644, 647 (1958).

Seventh, the Pinney plaintiffs allege that Nokia engaged in a civil conspiracy to market unsafe wireless telephones by improper and wrongful means, and, in doing so, both defrauded the plaintiffs and failed to warn them of the health risks of using wireless telephones. These claims are brought under the laws of Georgia and Maryland. In a claim for civil conspiracy a plaintiff must establish that two or more defendants, acting in concert, engaged in conduct constituting a tort. Damages are assessed on the basis of the defendants' tortious conduct, not on the basis of their agreement to engage in such conduct. *See Miller v. Lomax*, 266 Ga.App. 93, 596 S.E.2d 232, 242 (2004); *Alleco, Inc. v. Harry & Jeanette Weinberg Found., Inc.*, 99 Md.App. 696, 639 A.2d 173, 176-77 (1994).

We have thoroughly examined the claims asserted by the Pinney plaintiffs in their complaints, and one thing is clear: the elements of each of the claims depend only on the resolution of questions of state law. There is no "substantial, disputed question of federal law [that] is a necessary element of [any] of the well-pleaded state claims." *Franchise Tax Bd.*, 463 U.S. at 13, 103 S.Ct. 2841. The district court,

however, determined that these cases depend on the resolution of a substantial federal question because the claims "put . . . directly into dispute" the validity and sufficiency of the federal RF radiation standards for wireless telephones. *See In Re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, 216 F.Supp.2d 474, 488 (D.Md.2002) (*In re Wireless I*). The ultimate objective of these complaints, according to the district court, "is to attack the lack of a headset requirement under the federal RF safety rules." *Id.* Although the court acknowledged that the complaints contain no allegations attacking the federal RF radiation standards, it believed that it could ultimately resolve the case only by passing judgment on the validity of the federal standards. The court therefore determined that removal was justified under the substantial federal question doctrine. *Id.* at 488, 491-92.[1]

The district court erred by not recognizing that its inquiry was limited by the well-pleaded complaint rule. It should have considered only whether a disputed question of federal law is an essential element of one of the well-pleaded state claims. *See Franchise Tax Bd.*, 463 U.S. at 13, 103 S.Ct. 2841. The district court went beyond this restricted inquiry and in effect anticipated (1) that Nokia would raise the affirmative defense that the state law claims are preempted by the FCA and federal RF radiation standards and (2) that the Pinney plaintiffs would be called upon to rebut that

1. The dissent makes the same argument as the district court — that a substantial federal question exists because "the effect of [the Pinney plaintiffs'] allegations" is to "challenge the sufficiency of the FCC standard." *Post* at 459. As we explain in the text that follows, this argument cannot be sustained.

defense. The cases could be decided, the court concluded, only by resolving whether the claims are preempted by the FCA and the federal RF radiation standards. Even if that is so, a preemption defense "that raises a federal question is inadequate to confer federal jurisdiction." *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 808, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986). Again, "a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption," even if the complaint begs the assertion of the defense, and even if "the defense is the only question truly at issue in the case." *Franchise Tax Bd.*, 463 U.S. at 14, 103 S.Ct. 2841.

The thrust of the claims is that Nokia violated state law by manufacturing and selling a product that it knew, or should have known, was dangerous and by not adequately warning of the dangers. As was the case in *Franchise Tax Board*, state law establishes a set of elements, without reference to federal law, that the plaintiffs must establish in order to a make out "valid claim[s] for relief." 463 U.S. at 13, 103 S.Ct. 2841. Federal law becomes relevant only as a defense, and only after the Pinney plaintiffs have made out the elements of their state law claims. In this situation, as the Supreme Court has observed, "[t]he most one can say is that a question of federal law is lurking in the background." *Gully v. First Nat'l Bank*, 299 U.S. 109, 117, 57 S.Ct. 96, 81 L.Ed. 70 (1936). The lurking question of federal law is, of course, the affirmative defense of preemption, but that does not make the claims into ones arising under federal law.

Appendix A

B.

It becomes even clearer that the Pinney plaintiffs' claims do not contain a disputed question of federal law when we consider Nokia's arguments. Nokia argues that an issue of federal law must be resolved for the Pinney plaintiffs to establish the necessary elements for two of their claims. Nokia first points to the claim of strict liability due to a design defect. As discussed above, *see supra* at 12-13, one element a plaintiff must establish is that the product suffered from a design defect. A design defect is established by proving that the product is unreasonably dangerous, as determined by the risk-utility standard. Nokia argues that the FCC's RF radiation standards establish the relevant "duty" with regard to RF radiation emissions from wireless telephones, and therefore the unreasonably dangerous inquiry depends on the resolution of a federal question. Br. for Appellees at 26. Nokia's use of the term "duty" is misplaced because the term is more commonly employed in a negligence context, not a strict liability context. In any event, the nub of Nokia's argument is that a wireless telephone's compliance (or noncompliance) with the federal RF radiation standards determines whether the telephone is unreasonably dangerous. Nokia is wrong. Under the laws of Georgia, Maryland, and New York, compliance with the federal RF radiation standards is only one factor in assessing whether a wireless telephone is unreasonably dangerous under the risk-utility standard. *See Doyle v. Volkswagenwerk Aktiengesellschaft*, 267 Ga. 574, 481 S.E.2d 518, 521 (1997); *Beatty v. Trailmaster Prods.*, 330 Md. 726, 625 A.2d 1005, 1014 (1993); *Denny*, 639 N.Y.S.2d 250, 662 N.E.2d at 735-36; *Sherman v. M. Lowenstein & Sons, Inc.*, 28 A.D.2d 922, 282

N.Y.S.2d 142, 143-44 (N.Y.App.Div.1967). And because Pennsylvania law rejects the importation of negligence concepts into its strict liability doctrine, compliance with the federal RF radiation standards is not relevant in determining whether Nokia is strictly liable under Pennsylvania law for selling a product that suffers from a design defect. *See Lewis v. Coffing Hoist Div., Duff-Norton Co.*, 515 Pa. 334, 528 A.2d 590, 593-94 (1987) (holding that product compliance with industry standards is irrelevant in strict liability case based on defective design). Thus, even if Nokia's wireless telephones comply with the federal RF radiation standards, the Pinney plaintiffs could still establish the defective design element of the their strict liability claim. Conversely, if Nokia's wireless telephones do not comply with the federal RF radiation standards, the Pinney plaintiffs would not automatically establish the defective design element.

Nokia also argues that the Pinney plaintiffs "need to establish disputed federal-law propositions" to make out their fraud claims. Br. for Appellees at 27. To make out a claim of fraud, a plaintiff must establish, among other elements, that the defendants made a false statement. Nokia asserts that the Pinney plaintiffs, in order to prove that statements made by Nokia were false, must demonstrate that the "substantive content of federal wireless emissions regulations is inconsistent with [Nokia's] alleged characterizations of those regulations." *Id.* This is a mischaracterization of the fraud claims. The Pinney plaintiffs do not allege that Nokia fraudulently misrepresented the RF radiation standards. Rather, they allege that Nokia made false statements by misrepresenting the general safety of wireless telephones and

by misrepresenting or failing to disclose the biological risks posed by wireless telephones. To prove the falsity of these statements, the Pinney plaintiffs must establish that the RF radiation emissions from wireless telephones create a health risk. This has nothing to do with the substantive content of the federal regulations. In sum, there is no substantial question of federal law that is a necessary element of the Pinney plaintiffs' strict liability (design defect) or fraud claims.[2]

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2. In arguing for removal jurisdiction, the dissent points to one of the many factual allegations made by the Pinney plaintiffs in support of their fraud claims. The Pinney plaintiffs allege that Nokia engaged in fraud on an occasion when it claimed that wireless telephones are safe and "fall within [FCC] safety standards," but "deceitfully omitted the fact that the FCC had declared that it does *not* consider itself the 'expert agency' for evaluating health effects." J.A. 142 (emphasis in original). According to the dissent, this allegation "call[s] into question the expertise of the FCC." *Post* at 37. That is not the case. To establish that the safety statement made by Nokia was false, a necessary element for fraud, the Pinney plaintiffs need only prove that the failure to disclose the FCC's statement was the concealment of a material fact or that Nokia's safety statement was false in light of the FCC's statement. The plaintiffs will not have to prove any lack of FCC expertise in the RF radiation area in order to establish that Nokia made false statements about the safety of wireless telephones. A "substantial, disputed question of federal law" is simply not a necessary element of the fraud claims. *Franchise Tax Bd.*, 463 U.S. at 13, 103 S.Ct. 2841.

The dissent also relies on a general allegation in the Pinney plaintiffs' complaint to support its argument that removal jurisdiction exists. This allegation is that Nokia "obtain[ed] and exercised control over the American National Standards Institute ('ANSI') Committee

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To get around this problem, Nokia advances a new theory — the "sufficient connection" to a federal regulatory scheme theory — for why the Pinney plaintiffs' claims are removable pursuant to the substantial federal question doctrine. Nokia relies on our decision in *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799 (4th Cir.1996), to argue that "where a plaintiff's state law complaint is sufficiently connected to a federal regulatory regime as to which Congress has expressed a need for uniform implementation and interpretation, that connection can provide a basis for federal question jurisdiction even if no explicitly federal claim is pled." Br. for Appellees at 25. Nokia does not suggest a standard for determining when a connection is sufficient to render removal proper under its theory, but it nonetheless asserts that a sufficient connection exists in the present cases. According to Nokia, there is a comprehensive federal scheme to regulate wireless telecommunications, and Congress has delegated to federal regulators the exclusive authority over all technical aspects of wireless telecommunications. A sufficient connection exists between the telecommunications regulatory regime and the Pinney plaintiffs' claims, Nokia says, because

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responsible for developing safety standards for RFR emitting devices." J.A. 140. ANSI's proposals regarding RF radiation standards were generally adopted in FCC rulemaking. *See In re Guidelines*, 11 FCC Rcd. at 15123-25, 1996 WL 926565. According to the dissent, the allegation about Nokia's influence over ANSI means that the plaintiffs "are . . . attacking the rule-making process that the FCC used in developing [its RF radiation] standards." *Post* at 38. The dissent, however, does not explain how the allegation about ANSI raises a substantial question of federal law that is a necessary element of any one of the plaintiffs' state law claims.

the claims are premised on the amount of RF radiation that emits from wireless telephones, a technical aspect of wireless telephones that is regulated by the FCC. To begin with, Nokia's sufficient connection theory, as applied to these claims, is similar to, if not indistinguishable from, the argument that the Pinney plaintiffs' claims are removable under the substantial federal question doctrine because they are preempted by the FCA and the federal RF radiation standards. Nokia, of course, avoids couching its argument in preemption terms because it knows that the affirmative defense of preemption cannot serve as a basis for removal under the substantial federal question doctrine. Regardless of whether Nokia's sufficient connection theory is at bottom a preemption argument, we reject it because it is not supported by our *Ormet* decision, and it is inconsistent with Supreme Court precedent.

Ormet does not establish, or even support, Nokia's sufficient connection theory. In *Ormet* one of the elements of the plaintiff's state commercial law claim contained a disputed question of federal law: for the plaintiff to establish the element, it had to show that it was an owner (as defined by the federal Clean Air Act) of tradeable emission allowance permits. 98 F.3d at 807. Nokia relies on our statement, "[w]here the resolution of a federal issue in a state-law cause of action could, because of different approaches and inconsistency, undermine the stability and efficiency of a federal statutory regime, the need for uniformity becomes a substantial federal interest, justifying the exercise of jurisdiction by federal courts." *Id.* at 807 (citation omitted). Nokia claims this language stands for the proposition that a nexus (or, in Nokia's words, a "sufficient connection")

between a plaintiff's claim for relief and a federal regulatory scheme is sufficient to establish removal jurisdiction. Nokia's reliance on the quoted statement from *Ormet* is completely off the mark because the statement specifically addresses the issue of whether a federal question is substantial enough to justify removal jurisdiction, not the threshold issue of whether a federal question must be resolved in order for the plaintiff to establish a necessary element of his claim. Nowhere in *Ormet* did we ever suggest that some "sufficient connection" between a federal regulatory regime and a state claim is enough to establish removal jurisdiction. In short, *Ormet* did not slacken in any way the principle that the substantial federal question doctrine applies only when a disputed issue of federal law is an essential element of at least one of the plaintiffs' state claims.

Ormet aside, Nokia's sufficient connection theory is inconsistent with Supreme Court precedent. By Nokia's reasoning, even if the Pinney plaintiffs can establish the necessary elements of their claims without resolving a question of federal law, the cases are still removable under the substantial federal question doctrine because of a connection between the federal scheme regulating wireless telecommunications and the Pinney plaintiffs' state claims. That is not enough. The Supreme Court has been quite clear that for removal to be proper under the substantial federal question doctrine, a plaintiff's ability to establish the necessary elements of his state law claims must rise or fall on the resolution of a question of federal law. *See Merrell Dow*, 478 U.S. at 813, 106 S.Ct. 3229 ("[T]he mere presence of a federal issue in a state cause of action does not confer federal question jurisdiction."). In sum, removal of these

cases cannot be sustained on the basis of the substantial federal question doctrine.

C.

Having determined that these cases do not arise under federal law pursuant to the substantial federal question doctrine, we consider whether they arise under federal law through the doctrine of complete preemption. Under complete preemption a state claim arises under federal law when Congress "so completely preempt [s] a particular area that any civil complaint raising th[e] select group of claims is necessarily federal in character." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987). There is, of course, a difference between the doctrine of complete preemption and the affirmative defense of federal preemption. "As a defense, [federal preemption] does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court." *Id.* at 63 (citation omitted). In contrast, the doctrine of complete preemption "converts an ordinary state common law complaint into one stating a federal claim," *id.* at 65, and the federal claim is deemed to appear on the face of the complaint. *Darcangelo v. Verizon Commu ıications, Inc.*, 292 F.3d 181, 187 (4th Cir.2002). To remove an action on the basis of complete preemption, a defendant must establish that the plaintiff has a "discernible federal [claim]" and that "Congress intended [the federal claim] to be the exclusive remedy for the alleged wrong." *King v. Marriott Int'l, Inc.*, 337 F.3d 421, 425 (4th Cir.2003).

In assessing the removal of these cases on the basis of complete preemption, our basic inquiry is whether the FCA

establishes the exclusive claim for consumers alleging injury by wireless telephones. Nokia argues that §§ 201 and 207 of the FCA provide the exclusive claim for the Pinney plaintiffs. Section 207 allows private parties to sue common carriers and recover damages resulting from a common carrier's breach of its obligations under the FCA. 47 U.S.C. § 207. Nokia argues that the Pinney plaintiffs' exclusive claim is to allege that Nokia violated § 201(b), which imposes on common carriers the obligation that "[a]ll charges, practices, classifications, and regulations for and in connection with [wire or radio] communication service, shall be just and reasonable." 47 U.S.C. § 201(b). Specifically, Nokia argues that the sale of dangerous wireless telephones constitutes a "practice in connection with" wireless service. Nokia is wrong in saying that the FCA provides the exclusive claim.

First off, § 207 does not provide any claim against a number of the defendants in these cases. Sections 201 and 207 allow recovery only against common carriers. Under the FCA "'common carriers' are entities that must provide [transmission] service [s] to the public without discrimination and are heavily regulated by the FCC." *In re Application of the United States for an Order Authorizing the Roving Interception of Oral Communications*, 349 F.3d 1132, 1137 n. 9 (9th Cir.2003) (citations omitted); *see also* 47 U.S.C. § 153(10). In the wireless telecommunications arena, "[a] person engaged in the provision of" wireless service is treated as a common carrier. *See* 47 U.S.C. § 332(c)(1)(A). In their complaints the Pinney plaintiffs name two groups of defendants: providers of wireless service (that also market and distribute wireless telephones) and manufacturers of wireless telephones. As to the second group, the plaintiffs

allege that these defendants "engaged in the design, manufacture, marketing, and sale of" wireless telephones. *See, e.g.*, J.A. 122-127. There are no allegations that these manufacturer-defendants are engaged in providing any wireless service, and we therefore conclude that these defendants cannot be treated as common carriers. As a result, they cannot be sued under §§ 201 and 207.

As to the first group of defendants (certain wireless service providers), Nokia does not cite to any authority that supports the proposition that §§ 201 and 207 provide wireless telephone users with a claim against wireless service providers for their role in marketing and distributing wireless telephones. An interpretation of § 201 that would construe the selling of dangerous wireless telephones as a "practice in connection with" wireless service would be dubious at best. A "practice in connection with" wireless service does not even include tortious conduct such as deceptive advertising and billing by wireless service providers in the provision of wireless telephone service. *See Marcus v. AT&T Corp.*, 138 F.3d 46, 54 (2d Cir.1998). Further, even if we were to broadly construe § 201 as Nokia urges, there is simply no evidence that Congress intended §§ 201 and 207 to be the exclusive claim for plaintiffs alleging injury from wireless telephones. Nokia fails to identify any evidence in the statute or legislative history that Congress intended §§ 201 and 207 to preempt completely state law claims that are based on a wireless service provider's sale and promotion of wireless telephones. The single authority to which Nokia cites is an FCC statement claiming that individual states should not be permitted to add additional requirements to the standards the FCC imposes for cellular systems. *See* Br. for Appellees at

36 (citing *In re An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Sys.*; *and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communication Sys.*, 89 F.C.C.2d 58, 1982 WL 190439 (1982)). This statement is not evidence of congressional intent, and we accord it no weight.

The FCA also contains a savings clause: "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414. The presence of a savings clause counsels against a finding that Congress intended to sweep aside all state claims in a particular area. Indeed, at least two circuits have recognized in other contexts that § 414 precludes such a finding. *See Smith v. GTE Corp.*, 236 F.3d 1292, 1313 (11th Cir.2001) (concluding that § 414 counsels against a determination that the FCA completely preempts telecommunications customers' claims against a telecommunications service provider's fraudulent conduct in leasing telephones and related equipment); *Marcus*, 138 F.3d at 54 (concluding that § 414's savings clause counsels against a determination that the FCA completely preempts wireless service customers' claims against a wireless service provider based on the provider's deceptive billing and false advertising). Because there is no evidence that Congress intended the FCA to provide the exclusive remedy for claims like those of the Pinney plaintiffs, and because there is evidence that Congress intended to preserve state law claims such as the ones asserted in these cases, we conclude that these claims do not arise under federal law through the doctrine of complete preemption. Because the Pinney

plaintiffs' claims do not arise under federal law, the district court lacked jurisdiction over them, making removal improper.

III.

After the district court denied the Pinney plaintiffs' motion to remand their four cases to state court, it dismissed all five cases, including the one brought by the Naquin plaintiffs, on the ground that the claims are preempted by the FCA. Because the district court lacked subject matter jurisdiction over the four cases brought by the Pinney plaintiffs, the district court had no power to dismiss them. However, as we noted earlier, the district court has diversity jurisdiction over the case brought by the Naquin plaintiffs. *See* 28 U.S.C. § 1332(a). We must therefore review the district court's order granting Nokia's motion to dismiss the claims of the Naquin plaintiffs.

A.

Before we address the substance of the dismissal, we consider the Naquin plaintiffs' argument that the district court erred in taking up Nokia's motion to dismiss their case. They first contend the dismissal should be vacated because there is no subject matter jurisdiction over the other four cases (the Pinney plaintiffs' cases) that were consolidated with their case. The Naquin plaintiffs argue that if the district court had not erred in failing to recognize that it lacked jurisdiction over the cases of the Pinney plaintiffs, only the Naquin case would have remained, and Nokia's motion to dismiss would not have been considered due to lack of venue over the lone

remaining case. According to the Naquin plaintiffs, the district court's error also denied them the procedural right to petition the JPML or the district court for a retransfer of their case to the transferor court, the United States District Court for the Eastern District of Louisiana. Finally, the Naquin plaintiffs argue that the district court should not have considered the motion to dismiss because it had been denied by the transferor court prior to transfer.

There is no merit to the argument that venue over the Naquin plaintiffs' case in the District of Maryland was improper due to the lack of federal jurisdiction over the other four consolidated cases. The statute authorizing transfer (and consolidation) of multidistrict actions, 47 U.S.C. § 1407, is a venue statute that allows the JPML to override a plaintiff's choice of forum when three factors are present: (1) "one or more common questions of fact are pending in different districts," (2) a transfer would serve "the convenience of parties and witnesses," and (3) a transfer would "promote the just and efficient conduct of [the] actions." 28 U.S.C. § 1407(a); *see also In re Vernitron Secs. Litig.*, 462 F. Supp. 391, 394 (J.P.M.L.1978) ("Nor can the policies behind venue provisions designed to operate in the context of single independent actions prevail, in a multidistrict context, over the Panel's statutory mandate to weigh the interests of all the plaintiffs and all the defendants and to consider multidistrict litigation as a whole in light of the purposes of the law."). Transfer, of course, may be ordered only for the purpose of "coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a).

In the present cases, the JPML, after noting the presence of common questions of fact, found that "[c]entralization . . . in the District of Maryland [would] serve the convenience of the parties and witnesses and [would] promote the just and efficient conduct of the litigation, while accordingly being necessary in order to avoid duplication of discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary." *In Re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, 170 F.Supp.2d 1356 (J.P.M.L.2001) (order consolidating and transferring the cases to the District of Maryland). Because these findings satisfied the prerequisites for transfer, and because the proceedings were still in the pretrial stage, venue in the District of Maryland was proper. The Naquin plaintiffs essentially seek to add an additional requirement that subject matter jurisdiction must exist over all transferred and consolidated cases for venue to be proper in the transferee court. There is no basis for this requirement in either the multidistrict litigation statute or the case law.

The Naquin plaintiffs next argue that they were denied their procedural right to request a remand to the Eastern District of Louisiana as a result of the district court's error in finding subject matter jurisdiction over the cases brought by the Pinney plaintiffs. We disagree. At any point in the district court proceedings, the Naquin plaintiffs could have petitioned the JPML directly for a remand, or they could have requested that the district court suggest a remand to the JPML. J.P.M.L. Rule 7.6(c)(i), (ii); *see also In re Roberts*, 178 F.3d 181, 184 (3d Cir.1999) (noting that once a case is transferred, only the JPML, and not the transferee court, has the authority to remand the case to the transferor court). The Naquin

plaintiffs never moved the JPML for a remand nor asked the district court to suggest remand to the JPML. Because these plaintiffs failed to raise the remand issue with either the JPML or the district court, we consider the issue waived for purposes of this appeal. *See Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605 (4th Cir.1999) ("Generally, issues that were not raised in the district court will not be addressed on appeal.").

Finally, the Naquin plaintiffs argue that the district court's dismissal order should be vacated because Judge Lemelle of the Eastern District of Louisiana had denied, prior to transfer, motions to dismiss filed by some of the defendants. The Naquin plaintiffs claim that a transferee court may reconsider a prior order of a transferor court only when: (1) there is an intervening change in the law, (2) there is newly discovered (material) evidence, or (3) reconsideration is necessary to correct a clear error of law or prevent manifest injustice. The two cases relied on by the Naquin plaintiffs do not support such a constricted view of a transferee court's authority. In each of the cases, *Microbix Biosys., Inc. v. BioWhittaker, Inc.*, 184 F. Supp. 2d 434, 436 (D. Md. 2000), and *Potter v. Potter*, 199 F.R.D. 550, 552 (D. Md. 2001), the district court was ruling on a motion for reconsideration of its own order. The rules of constraint urged by the Naquin plaintiffs make sense when a district court is asked to reconsider its own order. "Were it otherwise, then there would be no conclusion to motions practice, each motion becoming nothing more than the latest installment in a potentially endless serial that would exhaust the resources of the parties and the court — not to mention its patience." *Potter*, 199 F.R.D. at 553. This same constraint is not always justified in

the multidistrict litigation context, where there is a need for consistent treatment of consolidated cases. *See Astarte Shipping Co. v. Allied Steel & Export Svc.*, 767 F.2d 86, 87 (5th Cir.1985) ("The transferee court has the power and the obligation to modify or rescind any orders in effect in the transferred case which it concludes are incorrect."); *Degulis v. LXR Biotech., Inc.*, 928 F. Supp. 1301, 1309 (S.D.N.Y.1996) ("A transferee court in a multidistrict litigation thus has the power to modify interlocutory orders entered by the transferor court prior to transfer under 28 U.S.C. § 1407.") (citation omitted). Here, Judge Lemelle, in denying the motions to dismiss, denied them without prejudice and explicitly acknowledged that the issue of federal preemption could be revisited later in the litigation. In sum, the district court did not err in considering Nokia's motion to dismiss the Naquin case.

B.

In their amended complaint the Naquin plaintiffs allege both state and federal claims and seek the same remedy as the Pinney plaintiffs, headsets for wireless telephones.[3]

3. For their federal claims the Naquin plaintiffs allege that Nokia has violated the Magnuson-Moss Warranty Improvement Act, 15 U.S.C. § 2310. More specifically, they allege that Nokia breached the implied warranty of fitness for a particular purpose by failing to provide headsets and by engaging in deceptive trade practices in failing to disclose the harmful effects of RF radiation from wireless telephones. This failure to disclose renders the manufacturers' express warranties for wireless telephones misleading, the amended complaint alleges. The district court appeared to dismiss the Naquin plaintiffs' amended complaint entirely on preemption grounds, even though federal claims are also alleged.

We now consider whether the Naquin plaintiffs' state law claims are preempted by the FCA. Under the Supremacy Clause a state law that "interferes with, or is contrary to" federal law is invalid. *Free v. Bland*, 369 U.S. 663, 666 (1962). There are three theories under which Congress preempts state law. First, under express preemption Congress expressly declares its intent to preempt state law. *S. Blasting Svcs., Inc. v. Wilkes County*, 288 F.3d 584, 590 (4th Cir. 2002) (citing *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)). Second, under field preemption Congress impliedly preempts state law when "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (internal quotation marks and citations omitted). Third, under conflict preemption Congress impliedly preempts state law when it "actually conflicts with federal law." *Hillsborough*, 471 U.S. at 713. We must remember that "the purpose of Congress is the ultimate touchstone in every preemption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks and citations omitted). Further, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (citation omitted). This presumption against preemption is particularly strong when Congress legislates "'in a field which the States have traditionally occupied,'" such as health and safety.[4]

4. The district court decided that the presumption against preemption does not apply here because the Naquin plaintiffs' claims relate to wireless telecommunications, an area where, according to

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Medtronic, 518 U.S. at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

1.

Nokia argues that the Naquin plaintiffs' claims are expressly preempted by two provisions of the FCA. The first provision appears in § 332(c)(7), which is aimed at the "[p]reservation of local zoning authority" over

(Cont'd)
the court, "'there has been a history of significant federal presence.'" *In re Wireless Tel. Radio Frequency Prods. Liab. Litig.*, 248 F. Supp. 2d 452, 463 (D.Md.2003) (quoting *United States v. Locke*, 529 U.S. 89, 108 (2000)). In *Locke* the Supreme Court concluded that the State of Washington's oil tanker regulations were not entitled to the presumption against preemption because the regulations governed national and international maritime commerce, an area long regulated by Congress. 529 U.S. at 108. The district court's reliance on *Locke* is misplaced because there is not the same federal presence in the wireless telecommunications area as there is in the area of maritime commerce. States continue to have considerable authority in the wireless telecommunications area. *See, e.g.*, 47 U.S.C. § 332(c)(3)(A) (providing that states may not regulate "the entry of or rates charged by" wireless service providers, but that they may regulate "other terms and conditions" of wireless service); 47 U.S.C. § 332(c)(7) (providing that state authority to regulate the "placement, construction, and modification of personal wireless service facilities" is preserved except in specific circumstances). While wireless telephones must meet the FCC's specifications and be authorized by the FCC before they can be sold, *see* 47 C.F.R. § 2.803, these provisions do not provide a remedy to someone injured by a defective wireless telephone. "The presumption against preemption is even stronger against preemption of state remedies, like tort recoveries, when no federal remedy exists." *Abbot v. Am. Cyanamid Co.*, 844 F.2d 1108, 1112 (4th Cir.1988) (citation omitted).

"decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). Nokia asserts that the claims are expressly preempted by § 332(c)(7)(B)(iv), which limits the general authority of local bodies as follows: "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions" if the facilities comply with the FCC's RF radiation standards. 47 U.S.C. § 332(c)(7)(B)(iv). This section applies only to "personal wireless service facilities," a term defined in circular fashion as "facilities for the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(C)(ii). The statute does not define the term "facilities" or "facility." We must therefore determine, as a matter of first impression, whether a wireless telephone constitutes a "facility" for purposes of § 332(c)(7)(B)(iv). We conclude that it does not.

"If the 'statutory language is unambiguous and the statutory scheme is coherent and consistent,' our inquiry ends." *Alexander S. v. Boyd*, 113 F.3d 1373, 1383 (4th Cir.1997) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 342 (1997)). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341. Although "facility" as used in § 332(c)(7)(B)(iv) is not defined, when the specific and broader contexts of its use are considered, it becomes plain that a wireless telephone is not a facility. The dictionary defines "facility" as "something (as a hospital, machinery, plumbing) that is built,

constructed, installed, or established to perform some particular function or serve or facilitate some particular end." Webster's Third New International Dictionary 812 (1993). If the dictionary definition was used here, a facility would be something "built, constructed, installed, or established" to provide personal wireless service. This might arguably include a wireless telephone. We continue our inquiry, however, and examine the specific statutory context in which the term "facility" is used. Section 332(c)(7) is entitled, "Preservation of local zoning authority" and provides, as the general rule, that "nothing [in the statute] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). The section goes on to provide limitations to the general rule, and in doing so attempts to strike a balance between the states' interests in regulating land use and the federal government's interest in facilitating the development of wireless telephone service. *See Omnipoint Communications Enters., L.P. v. Newtown Township*, 219 F.3d 240, 242-43 (3rd Cir.2000); *Town of Amherst v. Omnipoint Communications Enters., Inc.*, 173 F.3d 9, 13 (1st Cir.1999). Because § 332(c)(7) deals with the authority of the states *over zoning and land use*, we conclude that Congress intended the term "facility" to mean a structure or object, such as a base station or a mobile telephone switching office (MTSO), that falls within the states' zoning or land use authority. This interpretation excludes devices, such as wireless telephones, that are completely portable and have no attachment to land. The broader context in which the term "facility" is used also supports the interpretation that the term does not include wireless telephones. As we

discuss below, *see infra* at 33, Congress enacted the entire § 332 to ensure the availability of a nationwide network of wireless service coverage. Consistent with this objective, a facility should, at the very least, be part of the infrastructure (a base station or an MTSO, for example) that provides wireless service coverage. A wireless telephone, however, only accesses a wireless service provider's network of coverage; a wireless telephone itself is not part of the underlying infrastructure. Because both the specific context of the use of the term "facilities" in § 332(c)(7) and the broader context (and purpose) of § 332 reveal that a wireless telephone is not a facility under § 332(c)(7)(B)(iv), state tort claims relating to the manufacture and sale of wireless telephones are not expressly preempted by § 332(c)(7)(B)(iv).

Nokia next argues that § 332(c)(3)(A) expressly preempts the Naquin plaintiffs' claims. This section prohibits a state or local government from regulating "the entry of or the rates charged by any commercial mobile service," but allows it to regulate "other terms and conditions of commercial mobile services." 47 U.S.C. § 332(c)(3)(A). Nokia argues that the Naquin plaintiffs seek to use state law to regulate technical specifications for wireless telephones; this, Nokia says, would hinder entry into the commercial mobile service market because the FCC requires that wireless service providers certify that they are using only FCC-authorized equipment. Because Nokia cites to the licensing provisions dealing with personal communications services (PCS), a specific type of commercial mobile service, we understand Nokia's argument to assert that state regulation of wireless

telephone specifications constitutes a barrier to entry for PCS providers.[5]

While § 332(c)(3)(A) is unclear as to what precisely constitutes a barrier to entry into the PCS market, we conclude that the relief sought by the Naquin plaintiffs (a headset requirement) is not such a barrier. To begin with, the PCS market is a market for wireless *service*. Wireless service providers use base stations and MTSOs to create a network of coverage, a network that wireless telephone users generally pay a fee to access. The FCC licenses portions of the radio spectrum to wireless service providers so they can provide PCS coverage, *see* 47 C.F.R. § 24.1(a), (b), and one of the main requirements for the grant of a license is that the licensee must construct enough base stations to provide coverage to the area for which it receives a license. 47 C.F.R. §§ 24.103, 24.203. Accordingly, in order for state law to constitute a barrier to entry, it must, at a minimum, obstruct or burden a wireless service provider's ability to provide a network of wireless service coverage. *See, e.g., Bastien v. AT&T Wireless Svcs., Inc.*, 205 F.3d 983 (7th Cir.2000) (concluding that an

5. There are basically two competing modes of wireless communications, cellular services and PCS. Malcom J. Tuesly, Note, *Not in My Backyard: The Siting of Wireless Communications Facilities*, 51 Fed. Comm. L.J. 887, 888 (1999). Cellular systems operate in the 834-MHz to 894-MHz range, and PCS systems operate in the 1850-MHz to 1990-MHz range. Marshall Brain & Jeff Tyson, *How Cell Phones Work*, *at* http:// electronics.howstuffworks.com/ cell-phone.htm/printable (last visited Jan. 24, 2005). "As demand for cellular service has outgrown the available radio spectrum used for cellular signals, the wireless industry has turned to PCS, which utilizes digital technology that triples the capacity of traditional cellular systems." Tuesly, *supra* at 88.

action brought under state law to challenge the number of base stations in a coverage area constitutes a barrier to entry and is prohibited by § 332(c)(3)(A)).

A headset requirement for wireless telephones would not constitute a barrier to entry into the PCS market because wireless telephones are only used to access a wireless service provider's network of coverage; the telephones themselves do not provide the actual coverage. It is true that wireless service providers commonly market wireless telephones in conjunction with wireless service packages, and the wireless telephones that they sell must comply with federal RF radiation standards. *See* 47 C.F.R. § 24.52. Nevertheless, a wireless service provider's choice to bundle service packages and telephones does not mean that a headset requirement would affect its ability to enter into the wireless service market or to provide a network of wireless service coverage. Furthermore, notwithstanding Nokia's assertion, we find nothing in the regulations that requires a wireless service provider to certify, as a condition for obtaining a license to provide PCS, that the wireless telephones *used* within its coverage area comply with the FCC's RF radiation standards. This certification is generally undertaken by the manufacturer of the telephones when it requests equipment authorization. *See* 47 C.F.R. §§ 24.51(b); 24.52. Because the relief sought by the Naquin plaintiffs would not be a barrier for wireless service providers seeking to enter the PCS market, § 332(c)(3)(A) does not expressly preempt the claims of the Naquin plaintiffs.

2.

We also hold that the Naquin plaintiffs' claims are not preempted under the doctrines of conflict preemption and field preemption. As noted above, a state statute can be set aside by conflict preemption "when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough*, 471 U.S. at 713 (internal quotation marks and citations omitted). Again, there is a strong presumption against preemption when the federal government regulates in areas traditionally left to the states, such as health and safety. *Medtronic*, 518 U.S. at 485.

The district court concluded that the Naquin plaintiffs' claims are preempted because their cases stand as an obstacle to "Congress' objectives of achieving national uniformity in wireless telecommunications services and striking a balance between the proliferation of wireless services and the need to protect the public from any harmful effects of RF exposure." *In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, 248 F. Supp.2d 452, 463 (D. Md. 2003). Reasoning that the plaintiffs were essentially seeking to impose a headset requirement or a stricter RF radiation standard, the district court concluded that allowing the cases to go forward would usurp the regulatory authority Congress entrusted to expert federal agencies that had already confronted these issues. *Id.* The district court relied on § 332 of the FCA to find a sweeping congressional objective of ensuring that all equipment used in connection with wireless telecommunications be subject to exclusive national RF

radiation standards that have the effect of precluding state regulation on the subject. *Id.* at 464 (citing *In re Wireless I*, 216 F. Supp.2d at 483-87).

We conclude that the district court erred because the FCA provides no evidence of such an objective. Congress enacted § 332 to ensure the availability of a nationwide network of wireless service coverage, more specifically, to develop the infrastructure necessary to provide wireless services. Thus, § 332(1) provides factors that the FCC must consider in managing the spectrum used for wireless services, 47 U.S.C. § 332(a); (2) classifies wireless service providers that provide wireless service to the public for profit as "common carriers" (subjecting them to numerous duties under the FCA), 47 U.S.C. § 332(c)(1)(A); (3) prevents states from regulating "the entry of or the rates charged by" wireless service providers, 47 U.S.C. § 332(c)(3)(A); and (4) limits in certain respects the ability of states and local zoning authorities to regulate the "placement, construction, and modification" of facilities that provide wireless service, 47 U.S.C. § 332(c)(7).

We do not infer from § 332 the congressional objective of achieving preemptive national RF radiation standards for wireless telephones. First, § 332 does not address the subject of wireless telephones, let alone the more specific issue of the permissible amount of RF radiation from wireless telephones. The FCC's RF radiation standards for wireless telephones were not promulgated pursuant to a mandate contained in § 332 of the FCA, but rather pursuant to the National Environmental Policy Act's mandate that all agencies assess the environmental impact of their actions. For the FCC, the action was authorizing transmitters that

emit RF radiation. *In re Guidelines for Evaluating the Envt'l Effects of Radiofrequency Radiation*, 11 FCC Rcd. 15123, 15125 (1996). The complete absence of any provision addressing wireless telephones counsels against a finding that § 332 evidences a congressional goal of achieving preemptive national RF radiation standards for wireless telephones.

Second, in pursuing its objective of ensuring the availability of a nationwide network of wireless service coverage, Congress has been very careful to preempt expressly only certain areas of state law, preserving the remainder for state regulation. For example, § 332(c)(3)(A) prohibits states from regulating "the entry of or the rates charged by" wireless service providers, but explicitly provides that states may still regulate "the other terms and conditions of commercial mobile service." 47 U.S.C. § 332(c)(3)(A). And § 332(c)(7) preserves a good measure of the states' authority over decisions regarding "placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). Consistent with this conscious and careful effort to carve out the areas of state laws that it wants to preempt, Congress has specifically allowed for preemptive national RF radiation standards only for personal wireless service facilities. Section 332(c)(7)(B)(iv) provides that state and local zoning authorities may not "regulate the placement, construction, and modification of personal wireless service facilities" on the basis of RF emissions as long as the facilities comply with the FCC's RF radiation standards. This specificity as to the preemptive nature of federal RF radiation standards for personal wireless service facilities weighs against a finding that Congress has an implicit goal of making preemptive the

RF radiation standards for all other types of wireless telecommunications equipment, including wireless telephones.

Third, there are two applicable savings clauses. There is the general savings clause of the FCA, which provides that "[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414. And there is the savings clause in section 601(c)(1) of the Telecommunications Act of 1996. This Act added 47 U.S.C. § 332(c)(7), which preempts some of the states' authority to regulate the location of base stations (not wireless telephones); the savings clause, however, provides that the Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided. . . ." Telecommunications Act of 1996, Pub.L. No. 104-104, § 601(c)(1), 110 Stat. 56, 143. These savings clauses counsel against any broad construction of the goals of § 332 and § 332(c)(7) that would create an implicit conflict with state tort law.

Having determined that the FCA provides no evidence of a congressional objective to ensure preemptive national RF radiation standards for wireless telephones, we next examine whether the relief sought by the Naquin plaintiffs would stand as an obstacle to Congress' actual goal of establishing a nationwide network of wireless telephone service coverage. We conclude that it would not. It is difficult to understand how a headset requiremer (the specific relief sought) would affect the establishment of a nationwide wireless service network or the availability of wireless service

coverage. Wireless service providers generally provide wireless service coverage through a network of base stations that are coordinated by MTSOs. A wireless telephone user purchases a service plan from a wireless service provider, and the provider assigns the user a MIN and a SID, which allow the user to access this network of base stations and MTSOs. While wireless telephones access the network, they are not part of the infrastructure; accordingly, a headset requirement would not stand as an obstacle to Congress's goal of achieving nationwide coverage.

Finally, we reject Nokia's argument that the Naquin plaintiffs' claims are preempted on the basis of field preemption. As our previous discussion indicates, the FCA does not "so thoroughly occup[y][the] legislative field [of wireless telecommunications] as to make reasonable the inference that Congress left no room for the states to supplement it." *Cipollone*, 505 U.S. at 516. There is no evidence that Congress intended that state law claims, such as those asserted by the Naquin plaintiffs, be swept aside.

IV.

For the foregoing reasons, we reverse the district court's order denying the consolidated motion to remand made by the plaintiffs in the Pinney, Farina, Gilliam, and Gimpelson cases. Because federal subject matter jurisdiction does not exist over these four cases, we return them to the district court for remand to the state courts in which they originated. We also reverse the district court's order dismissing the Naquin plaintiffs' case as preempted by the FCA. That case is remanded to the district court for further proceedings.

REVERSED AND REMANDED

Appendix A

KISER, Senior District Judge, dissenting:

I dissent because, like the district court in its well-researched and well-reasoned opinion, I believe the case cannot be resolved without proving that the FCC's RF radiation emission standards are too high to protect the consuming public. This conclusion stems from a reading of the plaintiffs' complaint — not from any defense that the defendants may assert.

The majority opinion reviews in some detail what elements of the seven claims must be proved and concludes that none of the claims are dependent on whether or not the wireless telephones comply with the FCC standards. Apparently, the majority believes that the plaintiffs can prove their prima facie case of all seven claims without reference to the FCC standards regulating RF radiation emissions in wireless telephones and without proving that those standards are insufficient and invalid. I disagree. The plaintiffs are not trying this case in a vacuum. The FCC has enacted a uniform, nationwide regulatory scheme pertaining to wireless telephones which is the result of a thorough and complex rule-making process. The final rules reflect what the FCC believes will maintain the proper balance between the interest in promoting wireless communication throughout the country and the interest in protecting the health and safety of all consumers. The plaintiffs will not be able to ignore these standards. In proving their prima facie case for each claim, the plaintiffs will have to prove the unreasonableness of the RF radiation emitted by FCC-compliant wireless telephones. The plaintiffs will thus have to establish that the FCC standards are insufficient. It is well-settled that a suit to

invalidate a federal regulation arises under federal law. *See Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir.1998). In this case, the FCC standards' validity vel non is a matter of plaintiffs' proof by the very words of the complaint which purport to attack the FCC regulations. This thinly-disguised attack on the validity of the FCC standards raises a substantial federal question.

The plaintiffs attack the FCC standards in three ways. First, the plaintiffs challenge the sufficiency of the FCC standard. The plaintiffs allege that the defendants' wireless telephones, which comply with the FCC standard, do not give adequate protection from RF radiation. Although the plaintiffs have not indicted the FCC standard by name, that is the effect of their allegations.

Second, the plaintiffs challenge the expertise of the FCC. The plaintiffs allege that defendants were dishonest when they stated to the public that "cell phones fall within the safety standards of the [FCC]." ¶ 79. Plaintiffs arrive at the conclusion that the above statement is false because the defendants "omitted the fact that the FCC had declared it does not consider itself the 'expert agency' for evaluating health effects," even though the FCC relied on experts in evaluating health effects, one of which was the FDA. *See Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 88 (2d Cir.2000). This allegation is incorporated by reference in all of the plaintiffs' claims but is particularly pertinent to Count VI (Fraud) and Count VII (Fraud by Concealment). These allegations form a part of plaintiffs' factual basis on which these two counts are based. These are facts plaintiffs must prove along with any other alleged misrepresentations

to sustain the allegations in the complaint. Therefore, the plaintiffs call into question the expertise of the FCC and the sufficiency of its standards.

Third, the plaintiffs question the procedure by which the FCC developed the regulations. Specifically, the plaintiffs challenge the data on which the FCC relied. In the rule-making process, the FCC relied in part on standards of the American National Standards Institute ("ANSI"). *Id.* Plaintiffs allege that the defendants "obtain[ed] and exercise[d] control over the [ANSI] Committee responsible for developing safety standards for RFR emitting devices." ¶ 71. The plaintiffs are therefore attacking the rule-making process that the FCC used in developing these standards. Because the plaintiffs are making a direct attack upon the validity and sufficiency of the FCC regulations, their claims arise under federal law.

The majority finds that this case fails to raise a substantial federal question because it does not rise or fall on the resolution of a question of federal law. In support of this conclusion, the majority points out the holding of the Supreme Court that the "mere presence of a federal issue in a state cause of action does not confer federal question jurisdiction." *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 813 (1986). The situation in *Merrell Dow*, however, is inapposite to the one in this case. In *Merrell Dow*, the plaintiffs were supporting the Federal Food, Drug, and Cosmetic Act and claiming a violation of that act was negligence. Here, the plaintiffs are seeking to completely undo the FCC standard. Claims with the potential for severely limiting or eliminating a federal regulatory scheme raise a

much more substantial federal question than those that merely seek to inure to the benefit of such a scheme. On the other hand, I find this case very similar to our holding in *Ormet Corp. v. Ohio Power Co.* In *Ormet*, the plaintiff's claim was couched in traditional commercial litigation language, but we held that because the plaintiffs had to make reference to the Clean Air Act to define one of the terms of the contract there was a sufficient nexus to the Clean Air Act to support federal question jurisdiction. *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 807 (4th Cir.1996). The same logic applies here. Although the FCC regulation must be dealt with by the plaintiffs in a negative manner, its inadequacy is a fact that plaintiffs must prove. This provides a sufficient nexus to support federal question jurisdiction.

Moreover, the need for uniformity in a federal regulatory scheme heightens the importance of the federal question. In *Ormet*, we held that "[w]here the resolution of a federal issue in a state-law cause of action could, because of different approaches and inconsistency, undermine the stability and efficiency of a federal statutory regime, the need for uniformity becomes a substantial federal interest justifying the exercise of jurisdiction by federal courts." *Id.*(citing *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48, 4 L.Ed. 97 (1816)). Here, plaintiffs are not merely raising a claim which *may* undermine a federal regulatory scheme through inconsistent interpretations; rather they are raising claims which, if successful, *will* result in the complete invalidation of federal regulatory standards. This presents a substantial federal question.

This Court has repeated the call by Justice Cardozo for "principled, pragmatic distinctions" in determining federal question jurisdiction. *Columbia Gas Transmission Corp. v. Drain*, 191 F.3d 552, 558 (4th Cir.1999). In the words of Justice Cardozo, "[w]hat is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of causation . . . a selective process which picks the substantial causes out of the web and lays the other ones aside." *Id.* (quoting *Gully v. First National Bank*, 299 U.S. 109, 117-18, 57 S.Ct. 96, 81 L.Ed. 70 (1936)). Although we have affirmed our commitment to Justice Cardozo's words, the majority today does not adhere to the principles espoused in these words. We should not dismiss this case as lacking federal question jurisdiction simply because the plaintiffs have filed claims cloaked in state law language. Instead, we should use common sense and recognize that plaintiffs' claims directly implicate a federal regulatory scheme and threaten to undermine that same scheme. I would affirm the district court's finding of federal question jurisdiction.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND FILED MARCH 5, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MDL No. 1421
CIVIL NO. 01-MD-1421

IN RE: WIRELESS TELEPHONE RADIO FREQUENCY EMISSIONS PRODUCTS LIABILITY LITIGATION.

THIS DOCUMENT RELATES TO:

Civil No. CCB-01-1456
Pinney, et al. v. Nokia, Inc., et al. (D.Md.),

Civil No. CCB-01-3261
Farina v. Nokia, Inc., et al. (E.D.Pa.)

Civil No. CCB-01-3260
Gilliam, et al. v. Nokia, Inc., et al. (S.D.N.Y.)

Civil No. CCB-01-3899
Gimpelson v. Nokia, Inc., et al. (N.D.Ga.)

Civil No. CCB-01-3259
Naquin, et al. v. Nokia, Inc., et al. (E.D.La.)

Appendix B

MEMORANDUM AND ORDER

On June 21, 2002, the consolidated and renewed motion for remand filed by the plaintiffs in this multidistrict litigation was denied.[1] Because the plaintiffs' claims amounted to a disguised attack on the validity and sufficiency of federal safety regulations regarding cell phones, I found that federal question jurisdiction supported removal. The defendants then filed their consolidated motion to dismiss the plaintiffs' complaints under several theories of preemption. The motion has been fully briefed and argued and for the reasons set forth below, will be granted as to the complaints in *Pinney, Farina, Gilliam, Gimpelson,* and *Naquin.*[2]

As in the court's earlier opinion, it is necessary to analyze the plaintiffs' claims before determining whether those claims are preempted. Amended complaints were filed after the defendants filed their motions to dismiss. In *Pinney,* as amended, the named adult plaintiffs allege that they bought "WHHPs" (wireless handheld telephones) manufactured by Motorola and Nokia and sold without a headset. (*Pinney* Am.

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1. That opinion is incorporated herein by reference, to the extent relevant. *In re: Wireless Tel. Radio Frequency Emissions Prod. Liab. Litig.*, 216 F. Supp. 2d 474 (D.Md.2002) (hereinafter "*In re: Wireless*").

2. Since the preemption argument is dispositive of the defendants' motion to dismiss, other defenses raised in the papers will not be considered in this opinion. The issues of remand and preemption as to the complaint in *Brower* will be resolved in a separate opinion.

Compl. at ¶¶ 12-14.)[3] One of the adult plaintiffs bought the WHHP for primary use by her minor child. (*Id.* at ¶ 14.) They seek to represent past and future purchasers and lessees of WHHPs who were not furnished a headset when they acquired the WHHP and who "have not been diagnosed with a brain related tumor or cancer of the eye," the diseases purportedly caused by the radiofrequency ("RF") radiation ("RFR") emanating from cell phone antennas. (*Id.* at ¶ 45.)[4]

3. The definition of WHHP has been amended to refer only to "those that are designed and manufactured so as to readily allow for the use of a headset in conjunction with the WHHP." (*Pinney* Am. Compl. at ¶ 1.) WHHPs are also referred to as "cell phones" in this opinion.

4. Specifically, the proposed classes are defined as:

a. All purchasers or lessees of WHHPs who are residents of the State of Maryland, and who were residents of the State of Maryland when they purchased or leased a WHHP, who have not been diagnosed with a brain related tumor or cancer of the eye and who were not furnished a headset at the time they purchased or leased their WHHP;

b. All future purchasers of WHHPs who are residents of the State of Maryland and who have not been diagnosed with a brain related tumor or cancer of the eye; and

c. All purchasers or lessees of WHHPs who have purchased or leased WHHPs for use primarily by their minor children who are residents of the State of Maryland, and who were residents of the State of

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They claim that the defendants: failed to warn consumers about the possible adverse health risks associated with RFR emissions from cell phones and failed to explain that use of headsets could greatly reduce those risks, thus making the WHHPs defective and unreasonably dangerous (Count I—Strict Product Liability—Failure to Warn); violated the Maryland Consumer Protection Act by making false statements or omissions of material fact concerning the adverse health risks of RFR and the reduction in risk obtained by the use of headsets (Count II— Violation of Maryland Consumer Protection Act); breached implied warranties of merchantability by selling WHHPs without a headset (Count III—Breach of Implied Warranties); committed fraud by concealing evidence that WHHPs "are not safe for use" and intentionally failing to warn of health risks from RFR (Count IV—Fraud by Concealment); conspired to market unreasonably dangerous and defective WHHPs by, *inter alia*, "thwart[ing] efforts to regulate and control RFR emissions of WHHPs" and defrauding the plaintiffs "into believing WHHPs are safe without the use of a headset" (Count V—Civil Conspiracy); committed civil battery by intentionally exposing the plaintiffs to RFR, causing biological injury (Count VI—Civil Battery); and negligently misrepresented that WHHPs are safe (Count VII—Negligent Misrepresentation).

(Cont'd)

> Maryland when they purchased or leased a WHHP, whose minor children have not been diagnosed with a brain related tumor or cancer of the eye and who were not furnished a headset at the time they purchased or leased their WHHP.

(*Id.* at ¶ 45.)

The relief requested for each of these claims is identical. Compensatory damages are sought to purchase a headset for each class member or reimburse those who have already done so. Each class member who does not have one is to be provided a WHHP that can be used with a headset.[5] Further, each class member is to be provided "instructions for the use of a headset, as well as reasons why a headset should be used." (*Id.* at *Ad Damnum.*) The plaintiffs also seek punitive damages and attorneys' fees.[6]

In *Gimpelson,* the plaintiffs seek to represent a class of Georgia residents like the *Pinney* class but do not separately identify a class of minor children. The claims are identical to those in *Pinney* except for the absence of a statutory consumer protection act claim. In *Farina,* the plaintiffs allege similar causes of action on behalf of a class of Pennsylvania residents, including a specific claim for declaratory relief "requiring defendants to supply WHHP users with headsets . . . together with appropriate instructions . . ." (*Farina* Am. Compl. at ¶ 150.) In *Gilliam,* the plaintiffs identify classes consisting of adults and minors who are New York residents and they assert claims similar to those in *Pinney* and *Farina.*

Plaintiffs in the *Naquin* case bring claims for Louisiana residents and state them somewhat differently, although the central theme is identical: WHHPs without headsets are defective. (*See Naquin* Am. Compl. at ¶¶ VIII and XLV.)

5. This seems somewhat inconsistent with the definition of WHHP stated in paragraph 1 of the Amended Complaint.

6. The amended complaint deletes the request for injunctive relief preventing the sale of WHHPs without headsets.

Appendix B

Among the claims asserted are violations of federal law, specifically the Magnuson-Moss Warranty Improvement Act, 15 U.S.C. §§ 2301, *et seq.*, and Louisiana state law of redhibition.[7] The relief sought is the same as that requested in *Pinney, Gimpelson, Farina,* and *Gilliam.*[8]

The comprehensive federal regulatory scheme governing the licensing and RF emissions of cell phones was discussed in the court's earlier opinion and need not be repeated here. *See In re: Wireless Tel. Radio Frequency Emissions Prod. Liab. Litig.*, 216 F. Supp. 2d 474, 483-88 (D.Md.2002) (hereinafter "*In re:Wireless* "); *see also* "Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared," 47 C.F.R. § 1.1307 (2003); "Radiofrequency radiation exposure evaluation: mobile devices," 47 C.F.R. § 2.1091 (2003); "Radiofrequency radiation exposure evaluation:

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7. The Louisiana Civil Code explains that a product defect is redhibitory "when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. The existence of such a defect gives a buyer the right to obtain rescission of the sale. A defect is redhibitory also when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a buyer would still have bought it but for a lesser price. The existence of such a defect limits the right of a buyer to a reduction of the price." LA. CIV. CODE ANN. art. 2520 (West 2003).

8. In their amended complaint, the *Naquin* plaintiffs have deleted: (1) all claims under the Louisiana Unfair Trade Practices Laws for medical monitoring, emotional distress, and pain and suffering; and (2) all claims for any individualized physical injury. (*Naquin* Am. Compl. at ¶ CXXIX.)

portable devices," 47 C.F.R. § 2.1093 (2003); "Equipment authorization," 47 C.F.R. § 24.51 (2003); "RF hazards," 47 C.F.R. § 24.52 (2003). The regulation most pertinent to the present discussion is the RF emissions standard for portable devices, expressed in terms of specific absorption rate ("SAR"). *See* 47 C.F.R. § 2.1093(d).[9] This standard was set by a Federal Communications Commission ("FCC") regulation after careful consideration of the views of other federal agencies. *See In re: Wireless*, 216 F.Supp.2d at 485-87.[10] One such agency was the Food and Drug Administration ("FDA"), which has responsibility, under the Electronic Product Radiation Control Act ("EPRCA"), 21 U.S.C. § 360kk, in consultation with other agencies; for setting standards to protect the public health from radiation emitting products. Under the statute, the FDA has authority to "prescribe performance standards for electronic products to control the emission of electronic product radiation . . . if [it] determines that such standards are necessary for the protection of the public health and safety." 21 U.S.C.

9. As stated in the court's earlier opinion, "'SAR is a measure of the rate of energy absorption due to exposure to an RF transmitting source.'" 216 F.Supp.2d at 485 n. 7 (quoting 47 C.F.R. § 2.1093(d)). Defendants must comply with the RFR safety requirements in 47 C.F.R. § 2.1093(d) in order to make their phones available to the public.

10. The regulation was adopted under the authority derived from the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321, *et seq.* (*see also Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 87 (2d Cir. 2000)), as well as the Telecommunications Act of 1996, Pub.L. No. 104-104, § 704(b), 110 Stat 56, 152 (1996), which directed the FCC to conclude its already ongoing rulemaking process within 180 days.

§ 360kk(a)(1); *see also Verb v. Motorola, Inc.*, 284 Ill.App.3d 460, 220 Ill.Dec. 275, 672 N.E.2d 1287, 1293 (1996). Thus, it is apparent that the FCC and the FDA share significant responsibility for the regulation of environmental, health, and safety matters related to WHHPs. *See In re: Wireless*, 216 F. Supp. 2d at 485-87 (detailing the inter-agency collaboration between the FCC and the FDA in setting RF exposure standards); *see also "In re: Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation,"* 11 F.C.C.R. 15,123 at ¶¶ 18, 49, 62 (1996) (hereinafter "In re: Guidelines") (same); Press Release, Federal Communications Commission, "*FDA-FCC Cellular Phone and RadioFrequency Energy Website Posted for Public Use and Comment*" (May 8, 2002) (*available at* 2002 WL 920836 (F.C.C. May 8, 2002)) (hereinafter "Press Release") (describing website, entitled "Cell Phone Facts," jointly established by the FCC and the FDA to provide information regarding cell phones and RF energy).

State law or regulation, which may include the effects of suits under state tort law, may be preempted in several ways by the operation of a federal statute or regulation. *See, e.g., Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 865, 884 (2000). In each case, the objective or purpose of Congress is of primary concern in determining whether preemption exists. *See, e.g., Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-74 (2000); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996) (stating that "'the purpose of Congress is the ultimate touchstone' in every pre-emption case" and that such purpose is "revealed not only in the [statute's] text, but through the reviewing court's reasoned understanding of the way in which Congress intended the

statute and its surrounding regulatory scheme to affect business, consumers, and the law") (citations omitted).

State law may be expressly preempted by federal law, but even in the absence of an express provision, the Supreme Court has found that

> state law must yield to a congressional Act in at least two circumstances. When Congress intends federal law to "occupy the field," state law in that area is preempted. And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute. We will find preemption where it is impossible for a private party to comply with both state and federal law, and where "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Crosby, 530 U.S. at 372-73, 120 S.Ct. 2288 (citations omitted) (alterations in original); *see also City of Charleston v. A Fisherman's Best, Inc.*, 310 F.3d 155, 169 (4th Cir. 2002). These categories of preemption, of course, are not "'rigidly distinct.'" *Crosby*, 530 U.S. at 373 n. 6 (citation omitted).

The defendants first argue that the plaintiffs' claims are expressly preempted under 47 U.S.C. §§ 332(c)(7) and 332(c)(3). Section 332(c)(7) forbids the states from regulating "the placement, construction, and modification of personal wireless service facilities on the basis of the environmental

effects of radio frequency emissions," while Section 332(c)(3) forbids states from regulating "the entry of or the rates charged" by any commercial mobile service, but expressly allows states to regulate "the other terms and conditions" of such services.[11] These provisions, particularly 332(c)(7), present close questions.[12] Because the defendants' argument for implied conflict preemption is more compelling, however, I need not reach the question of express preemption. Similarly, it is not necessary to reach the issue of field preemption. *See, e.g., Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 713-14 (1985) (discussing field preemption analysis).[13]

Several preliminary issues must be discussed before proceeding to the question of implied conflict preemption. First, the plaintiffs have argued that the court should not reach the issue of preemption, which ultimately depends on an

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11. The plaintiffs' amended complaints seek to undermine the argument that a headset requirement would pose a barrier to entry under Section 332(c)(3) by defining the class as purchasers of WHHPs already equipped for headsets and by deleting the request for an injunction against the sale of WHHPs without headsets.

12. *See In re: Wireless*, 216 F.Supp.2d at 497 (noting that sections 332(c)(7) and 332(c)(3) are "strong express preemption provisions which may be held in state court to bar relief of the sort plaintiffs request").

13. Any attempt to rely on express or field preemption would, of course, have to contend with the presence of saving clauses in the Telecommunications Act of 1996, the Communications Act of 1934 and the EPRCA. *See* 47 U.S.C. §§ 152 (notes), 414; 21 U.S.C. § 360ss.

application of the Supremacy Clause, without first resolving all other defenses. The opinion relied upon by the plaintiffs, *Bell Atl. Maryland, Inc. v. Prince George's County*, 212 F.3d 863 (4th Cir. 2000), is distinguishable, however, because it is not at all clear there is an independent state law ground entirely dispositive of these complaints. *See MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356, 361 (4th Cir. 2001); *Bell Atlantic*, 212 F.3d at 865-66 (holding that the avoidance rule articulated in *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341, 346-47 (1936), applies when resolution of state law issues would dispose of the controversy). More importantly, *Bell Atlantic* preceded the decision in *Sprietsma v. Mercury Marine*, in which the Supreme Court proceeded directly to decide whether a federal statute preempted state common law tort claims, explaining that "[b]ecause the pre-emption defense raises a threshold issue, we have no occasion to consider the merits of petitioner's claims, or even whether the claims are viable as a matter of Illinois law." 123 S.Ct. 518, 522-23 (2002).[14]

Second, the plaintiffs suggest that the presence of express preemption and saving clauses essentially precludes a finding of implied conflict preemption in this case.[15] It is important

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14. Plaintiffs rely on *Sprietsma* for other reasons discussed later in this opinion.

15. In fact, the plaintiffs cite a House Conference Report for the proposition that the saving clause located in the Telecommunications Act of 1996, 47 U.S.C. § 152 (notes), "prevents affected parties from asserting that the bill impliedly preempts other laws." H. Conf. Rep. No. 104- 458, at 201 (1996). This comment (Cont'd)

to note *Sprietsma's* reminder that Congress's inclusion of an express preemption clause "'does *not* bar the ordinary working of conflict pre-emption principles,' that find implied pre-emption . . . 'where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 527 (citations omitted) (emphasis in original). Nor does the presence of a saving clause bar a finding of implied preemption, even where that clause is sufficient to preserve a "significant number" of common law tort actions for personal injury. *Geier,* 529 U.S. at 868-70, 120 S.Ct. 1913. Further, the combination of express preemption and saving provisions together impose no "special burden" on a party claiming conflict preemption. *Id.* at 870-71.

Third, the plaintiffs rely on a "presumption" against preemption of private damages remedies in the field of public health and safety, which has been within the "historic police

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must be read in context with settled case law. The Supreme Court "has repeatedly 'decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.'" *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 870 (2000) (quoting *United States v. Locke*, 529 U.S. 89, 106-07 (2000)). As explained elsewhere in this opinion, plaintiffs' claims are impliedly preempted because they conflict with the comprehensive federal regulatory scheme governing the RF emissions of cell phones and with the Congressional purposes that led to those regulations. *See also S. Blasting Servs., Inc. v. Wilkes County*, 288 F.3d 584, 589 (4th Cir. 2002) (holding that the "Supreme Court has repeatedly held that 'state laws can be pre-empted by federal regulations as well as by federal statutes'" (quoting *Hillsborough*, 471 U.S. at 713)).

powers of the State." *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund,* 520 U.S. 806, 814 (1997) (citing *Hillsborough County,* 471 U.S. at 715). That presumption is not triggered, however, when the state claim falls in an area "where there has been a history of significant federal presence." *United States v. Locke,* 529 U.S. 89, 108 (2000). Congressional concern for national uniformity of regulation in the field of wireless telecommunications has been clear since the inception of commercial wireless telephone service. *In re: Wireless,* 216 F. Supp. 2d at 483. Moreover, these lawsuits do not involve a traditional claim of compensation for personal injury. *Cf. Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 241-42 (1984). Indeed the class definition excludes those who have developed cancer, and the complaints contain no request for personal injury compensation. As a disguised attack on the adequacy of federal safety regulations, *see In re: Wireless,* 216 F. Supp. 2d at 479, these claims are very similar to the state law "fraud-on-the-agency" claims found impliedly preempted in *Buckman Co. v. Plaintiffs' Legal Comm.,* 531 U.S. 341 (2001). As the Court noted in *Buckman:* "Policing fraud against federal agencies is hardly 'a field which the States have traditionally occupied' . . . To the contrary, the relationship between a federal agency and the entity it regulates is inherently federal in character . . ." *Id.* at 347, 121 S.Ct. 1012 (citations omitted). Accordingly, there is no presumption against preemption in this case.

Finally, the plaintiffs contend that this court should not consider the defendants' preemption arguments because, prior to transfer of the cases by the Judicial Panel on Multi-District Litigation ("JPML") to this court, Judge Lemelle of the

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United States District Court for the Eastern District of Louisiana ruled that the *Naquin* plaintiffs' claims were not preempted. (*See* Defs.' Mem. in Supp. of their Consolidated Rule 12(b)(6) Mot. to Dismiss Pls.' Compls. as Preempted at Ex. A (Tr. of Mot. Heard in Open Court, 1/17/01) (hereinafter "Mot. Tr."); *see also* Supp. to Pls.' Mem. in Opp. to Defs.' Consolidated Rule 12(b)(6) Mot. to Dismiss Pls.' Compls. as Preempted at Ex. A (Minute Entry) (hereinafter "Minute Entry").) This earlier ruling is not dispositive of the present motion for several reasons. First, because Judge Lemelle stated explicitly that his order did "not foreclose reconsideration of preemption issues at a subsequent stage of this litigation" (*see* Minute Entry at 2), and because reconsideration of orders following transfer by the JPML is permitted to ensure consistent pretrial rulings, *see, e.g., Degulis v. LXR Biotechnology, Inc.*, 928 F.Supp. 1301, 1309 (S.D.N.Y.1996), the earlier preemption order is not binding on this court or dispositive of the present discussion. Second, Judge Lemelle's ruling preceded the establishment of the joint FDA-FCC website, which does not constitute regulation, but does contain a clear expression of the FDA's position on the adequacy of the FCC's SAR standard. Third, while the parties and Judge Lemelle mentioned FCC regulations in passing, the court based its order entirely on the perceived lack of a clear position articulated by the FDA. (Mot. Tr. at 33-38.) Insofar as the court was not asked to consider the numerous FCC regulations or the inter-agency statements regarding RF emissions from cell phones, its conclusion is distinguishable.

The question, then, is whether permitting these lawsuits would stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Crosby, 530 U.S. at 372-73. The answer is yes, because the only relief sought would necessarily require a judge and jury to usurp the regulatory function entrusted by Congress to the expertise and discretion of federal agencies. In addition, "the risk of fifty different states articulating fifty different rules about whether and to what extent they may set RF safety standards," *see In re: Wireless*, 216 F. Supp. 2d at 491, conflicts with Congress's objectives of achieving national uniformity in wireless telecommunications services and striking a balance between the proliferation of wireless services and the need to protect the public from any harmful effects of RF exposure. As I will explain further, under these specific circumstances, implied conflict preemption should be applied.[16]

First, Congress has expressed its intent on numerous occasions to achieve substantial national uniformity over the operation and regulation of wireless

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16. Plaintiffs contend that their actions are not preempted because the FCC refused to establish a federal rule of tort liability in connection with RF exposure, positing that it may "preempt too broad a scope of legal actions." "In re: Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934," 1997 WL 522796, 12 F.C.C.R. 13,494 at ¶¶ 83, 90 (1997) (hereinafter "FCC Second Order"). This argument is not persuasive. After noting that the establishment of such a rule was "beyond the scope of [the] proceeding," *id.* at ¶ 90, 1997 WL 522796, the FCC merely stated (in two sentences) that a rule preempting all state tort suits based on environmental effects of RF emissions may be too broad. *Id.* at ¶¶ 83, 90, 1997 WL 522796. I agree. This opinion holds only that plaintiffs' claims, as a disguised attack on the adequacy of federal regulations, are preempted.

telecommunications services. *See In re: Wireless,* 216 F. Supp. 2d at 483-84, 490-91 (noting Congress's intent that wireless telecommunications services "'operate without regard to state lines'") (citations omitted); *see also* 47 U.S.C. §§ 151, *et seq.*; H. Rep. No. 104-204. at 94 (1995), *reprinted in* 1996 U.S.C.A.N.N. 10, 61 (stating that "it is in the national interest that uniform, consistent requirements, with adequate safeguards of the public health and safety, be established as soon as possible").[17] Accordingly, Congress has granted extensive regulatory authority of wireless telecommunications services to the FCC, the FDA, and other federal agencies. *See, e.g., In re: Wireless,* 216 F. Supp. 2d at 483-87. In particular, the environmental effect of RFR in connection with wireless technology use has been expressly recognized by Congress as an issue for federal regulation. *See, e.g.,* Telecommunications Act of 1996, Pub.L. No. 104-104, § 704(b), 110 Stat 56, 152 (1996) (stating that, "Within 180 days after the enactment of [the Telecommunications Act of 1996], the [FCC] shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions");[18]

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17. The House Report continues: "Such requirements will ensure an appropriate balance in policy and will speed deployment and the availability of competitive wireless telecommunications services which ultimately will provide consumers with lower costs as well as with a greater range and options for such services." H. Rep. No. 104-204, at 94 (1995), *reprinted in* 1996 U.S.C.A.N.N. 10, 61.

18. Although specifically referring to the express preemption provision contained in section 332(c)(7), the following excerpt from

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"In re: Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934," 12 F.C.C.R. 13,494 at ¶ 32 (1997) (hereinafter "FCC Second Order") (urging standard-setting organizations "to work together, along with the relevant federal agencies, to develop consistent, harmonized guidelines that will address the concerns and issues raised in this proceeding"). Indeed, the FCC had undertaken that responsibility even before the specific deadline set by Congress. *See In re: Wireless,* 216 F. Supp. 2d at 483-87 (explaining that the FCC has asserted "'federal primacy over the areas of technical standards and competitive market structure for cellular service'" since at least 1981 and that it has evaluated the effects of RFR on the environment since 1985) (citations omitted); *see also* In re: Guidelines at ¶ 6. As stated above, the specific regulation adopted by the FCC limiting SAR for cell phones, 47 C.F.R. § 2.1093(d), reflects the "consensus view" of numerous federal agencies, including the FCC, the

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House Report 104-204 reveals Congress's intent to achieve national uniformity over RF emissions standards: "The [Commerce] Committee has received substantial evidence that local zoning decisions, while responsive to local concern about the potential effects of radio frequency emission levels, are at times not supported by scientific and medical evidence. A high quality national wireless telecommunications network cannot exist if each of its component [sic] must meet different RF standards in each community. The Committee believes the [FCC] rulemaking on this issue (ET Docket 93-62) should contain adequate, appropriate and necessary levels of protection to the public, and needs to be completed expeditiously." H. Rep. No. 104-204, at 95 (1995), *reprinted in* 1996 U.S.C.A.N.N. 10, 61-62.

FDA, the Environmental Protection Agency, the Occupational Safety and Health Administration, and the National Institute for Occupational Safety and Health, which itself is part of the Centers for Disease Control and Prevention. *See In re: Wireless*, 216 F. Supp. 2d at 485-87, n. 9-10.

Moreover, the FCC regulations represent a policy decision closely analogous to that described by the Second Circuit in *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 91-92 (2d Cir. 2000): that is, a judgment about the amount of safety margins that should be required by regulation in the face of scientific uncertainty about the precise extent of any danger presented by RFR.[19] According to the FCC, the exposure limit "'is one fiftieth of the point at which RF energy begins to cause any unhealthful thermal effect.'"[20]

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19. In *Cellular Phone Taskforce*, the Second Circuit rejected an appeal from the two FCC final orders that established safety standards for RF emissions. 205 F.3d at 87 (citing, *inter alia*, FCC Second Order).

20. Despite plaintiffs' contentions to the contrary, the federal agencies also considered the non-thermal effects of RF exposure when formulating their regulations and opinions. *See Cellular Phone Taskforce*, 205 F.3d at 90-91 (explaining that the American National Standards Institute and the National Council on Radiation Protection and Measurements considered non-thermal effects when promulgating their standards, which form the basis of the FCC guidelines); FCC Second Order at ¶¶ 19-39 (reaffirming FCC exposure limits in response to challenges that they did not protect against "non-thermal effects," by stating that the established exposure limits "provide a proper balance between the need to protect the public and workers from exposure to excessive RF electromagnetic

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In re: Wireless, 216 F. Supp. 2d at 485 (citations omitted); *see also* FCC Second Order at ¶ 114 (noting that the FCC adopted "more conservative RF exposure guidelines" to comport with Congress's intent that the FCC rules "'contain adequate, appropriate and necessary levels of protection to the public'") (citations omitted). Although the FCC standard does not keep RF exposure as low as reasonably achievable, the Second Circuit determined that so requiring "would be inconsistent" with the FCC's mandate to "'balance between the need to protect the public . . . and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible.'" *Cellular Phone Taskforce*, 205 F.3d at 91-92 (citations omitted); *see also* 47 U.S.C. §§ 151, 157(a) (articulating Congress's objectives of "mak[ing] available . . . a rapid, efficient, nationwide, and world-wide wire and radio communications service" and "encourag[ing] the provision of new technologies and services to the public"); FCC Second Order at ¶ 39 (concluding that the established RF exposure limits "are

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fields and the need to allow communications services to readily address growing marketplace demands"); Brief for the Respondents in Opposition [to Petition for Writ of Certiorari] at 22-23, *Cellular Phone Taskforce v. FCC*, U.S. Sup.Ct. No. 00-393 (2000) (elaborating on the agencies' consideration of the possible non-thermal effects of RF energy and quoting a letter from the EPA stating that, "'The majority of currently available studies suggests . . . that there are no significant non-thermal human health hazards. It therefore continues to be EPA's view that the FCC exposure guidelines adequately protect the public from all scientifically established harms that may result from RF energy fields generated by FCC licensees'") (citations omitted).

appropriate because they address [safety] concerns and, at the same time, allow applicants and licensees to meet the growing marketplace demand for communications services"). That policy decision has been supported by the FDA, not only implicitly by its decision not to require any stronger action under 21 U.S.C. § 360kk, but also explicitly by its recent adoption of the joint FDA-FCC website addressing cell phone health and safety. *See* "Cell Phone Facts," *available at* http://www.fda.gov/cellphones/qa.html (hereinafter "Cell Phone Facts").[21]

As stated above, while the website does not, of course, constitute regulatory action, it is an important indication of agency purpose and opinion. Admittedly, the website does identify use of a headset as an option for consumers if they are "concerned about avoiding even potential risks." *Id.* The same set of questions and answers, however, states that "the existing scientific data do not justify FDA regulatory actions." *Id.* This is a clear statement of the FDA's position.[22] Further,

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21. As stated by the FCC on the website, "Our joint efforts with the FDA in developing this website is [sic] illustrative of the kind of inter-agency efforts and consultation we engage in regarding this health and safety issue." *See* Cell Phone Facts.

22. The FCC recently reiterated that it shares the FDA's position of refraining from regulating unless and until scientific data supports doing so. In dismissing a recent challenge to the RF safety rules, the FCC emphasized that, "We note that, as with any decision related to the health impact of technologies regulated by the Commission, if medical opinion on the impact of these technologies changes, we will consider whether our rules should be adjusted." "In re: Amendment of Part 15 of the Commission's Rules to Permit

(Cont'd)

in discussing hands-free kits and shielding devices, the website explains that "[s]ince there are no known risks from exposure to RF emissions from wireless phones, there is no reason to believe that hands-free kits [or shielding devices] reduce risks."[23] *Id.* "Wireless phones marketed in the U.S. are required to meet safety requirements regardless of whether they are used against the head or against the body. Either configuration should result in compliance with the safety limit." *Id.* The website also acknowledges, of course, that there is no proof wireless phones are "absolutely safe." *Id.*

As demonstrated, Congress passed legislation, and federal agencies collaborated in regulating RF emissions, guided by the objectives of achieving a nationally uniform wireless telecommunications system and balancing the development of that system with the need to protect the public

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Operation of Biomedical Telemetry Devices on VHF TV Channels 7-13 and on UHF TV Channels 14-46," 17 F.C.C.R. 8,948 at ¶ 5 (2002); *see also* In re: Guidelines at ¶¶ 4, 34 (same); FCC Second Order at ¶ 32 (same); Press Release (stating that "both agencies" (the FCC and the FDA) monitor studies regarding the risks of exposure to RFR and they "will take follow-up action as appropriate"); Cell Phone Facts (stating that "government agencies are continuing to monitor the latest scientific findings to determine whether changes in safety limits are needed to protect human health").

23. Indeed "shields" may lead to an increase in absorption. Cell Phone Facts (explaining that "so-called 'shields' may interfere with proper operation of the phone . . . [which] may be forced to boost its power to compensate, leading to an increase in RF absorption").

from any harmful effects of RF exposure. *See, e.g.*, 47 U.S.C. §§ 151, *et seq.*; 21 U.S.C. § 360kk; 47 C.F.R. §§ 1.1307, 2.1091, 2.1093, 24.51, 24.52. The federal agencies refrained, however, from imposing a headset requirement or a stricter SAR standard. *See, e.g., Cellular Phone Taskforce*, 205 F.3d at 90-93; 47 C.F.R. §§ 2.1093, 24.51; "In re: Amendment of Part 15 of the Commission's Rules to Permit Operation of Biomedical Telemetry Devices on VHF TV Channels 7-13 and on UHF TV Channels 14-46," 17 F.C.C.R. 8,948 at ¶ 5 (2002); Cell Phone Facts. Plaintiffs' complaints essentially request various state courts to impose a headset requirement, the very purpose of which is to reduce the SAR of RF exposure to the head. (*See, e.g., Pinney* Am. Compl. at ¶ 64 (alleging that, "Appropriately designed headsets when properly used eliminate the WHHP users' exposure to RFR").) Such a request conflicts not only with the current SAR standard, 47 C.F.R. § 2.1093, but also with the agencies' deliberate decision to forego a headset requirement. Accordingly, plaintiffs' state tort lawsuits stand "as an obstacle to the accomplishment and execution of the full purposes and objective of Congress," *Crosby*, 530 U.S. at 372-73, namely, deference to the expertise of federal agencies, the development of national uniform standards, and the balance between developing a wireless telecommunications system and protecting the public.

The Supreme Court's recent opinion in *Sprietsma*, relied on by plaintiffs, establishes that an agency's decision not to require a particular safety device does not, in itself, require implied preemption of all state law claims based on the absence of that device. 123 S.Ct. at 527-30. *Sprietsma*, however, involved a traditional state law claim for personal

injury, thus invoking the "important remedial role in compensating accident victims." *Id.* at 527. The saving clause under consideration in *Sprietsma*, "Compliance with . . . regulations . . . prescribed under this chapter does not relieve a person from liability at common law or under State law," was found by the Court to have "compensation" as its "manifest object," thus preserving "private damages remedies." *Id.* at 527. The plaintiffs simply do not seek to compensate personal injury in these suits. Despite the fact that the plaintiffs have not alleged any adverse health effects suffered as a result of their use of cell phones, they nonetheless seek to have the responsible federal agencies' judgment overruled in several separate states by an individual judge or jury through compensatory and declaratory relief requiring the provisions of headsets, instructions, and "reasons" the headsets should be used. Such a result is contrary to the Congressional purposes of national uniformity, deference to agencies' expertise, and striking an appropriate balance between wireless telecommunications development and public safety.[24]

24. *Sprietsma* is distinguishable from this case on other bases, as well. First, Congress authorized the Secretary of Transportation (who delegated this authority to the Coast Guard) to issue regulations establishing "'*minimum* safety standards'" for recreational boats, *see* 123 S. Ct. at 523 (quoting 46 U.S.C. § 4302) (emphasis added), thereby explicitly suggesting that federal policy could be augmented by state law. Second, the *Sprietsma* Court noted repeatedly that propeller-strike injuries are a known risk of boating, 123 S.Ct. at 525 n. 8 (citing reports pertaining to the number of propeller injuries and fatalities), whereas there are no proven risks from exposure to RF emissions from cell phones. *See, e.g.*, Cell Phone Facts. Finally, while the *Sprietsma* Court emphasized that "the Solicitor General, (Cont'd)

For the foregoing reasons, I find that implied conflict preemption applies to this case and, therefore, defendants' consolidated motion to dismiss the complaints in *Pinney, Farina, Gilliam, Gimpelson,* and *Naquin* will be granted on this basis.

A separate Order follows.

(Cont'd)

joined by counsel for the Coast Guard, has informed [it] that the agency does not view the 1990 refusal to regulate or any subsequent regulatory actions by the Coast Guard as having any pre-emptive effect," 123 S. Ct. at 529, there has been no such concession in this case.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MDL No. 1421
CIVIL NO. 01-MD-1421

IN RE: WIRELESS TELEPHONE RADIO FREQUENCY EMISSIONS PRODUCTS LIABILITY LITIGATION.

THIS DOCUMENT RELATES TO:

Civil No. CCB-01-1456
Pinney, et al. v. Nokia, Inc., et al. (D.Md.),

Civil No. CCB-01-3261
Farina v. Nokia, Inc., et al. (E.D.Pa.)

Civil No. CCB-01-3260
Gilliam, et al. v. Nokia, Inc., et al. (S.D.N.Y.)

Civil No. CCB-01-3899
Gimpelson v. Nokia, Inc., et al. (N.D.Ga.)

Civil No. CCB-01-3259
Naquin, et al. v. Nokia, Inc., et al. (E.D.La.)

Appendix B

ORDER

For the reasons stated in the accompanying Memorandum, it is hereby Ordered that:

1. defendants' consolidated motion to dismiss as preempted the complaints in *Pinney, Farina, Gilliam, Gimpelson,* and *Naquin* is GRANTED;

2. copies of this Order and the accompanying Memorandum shall be sent to counsel of record; and

3. the clerk of the court shall CLOSE the aforementioned cases.

_____/s/_____
Catherine C. Blake
United States District Judge

March 5, 2003
Date

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND FILED JUNE 21, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MDL No. 1421

Civil Action No. 01-MD-1421

IN RE WIRELESS TELEPHONE RADIO FREQUENCY EMISSIONS PRODUCTS LIABILITY LITIGATION

THIS DOCUMENT RELATES TO:

Pinney, et al. v. *Nokia, et al.* (D.Md.)
Farina v. Nokia, et al. (E.D.Pa.)
Gilliam, et. al. v. Nokia, Inc., et. al. (S.D.N.Y.)
Gimpelson v. Nokia, Inc., et. al. (N.D.Ga.)
Naquin, et. al. v. Nokia, Inc., et al. (E.D.La.)

MEMORANDUM

The plaintiffs in this multidistrict litigation have brought five class actions against defendants in the states of Maryland, Pennsylvania, New York, Georgia, and Louisiana. Each count of each complaint is brought, on its face, under state statutory or common law.[1] Asserting federal jurisdiction under several

1. Each of the five complaints, which are substantially similar in all material respects, asserts some combination of the following state law claims: strict products liability (failure to warn, design or manufacturing defect); violations of state consumer protection laws; (Cont'd)

theories, the defendants filed notices of removal under 28 U.S.C. § 1441(b) in all five actions. The Judicial Panel on Multidistrict Litigation transferred the cases to this court. Now pending is plaintiffs' consolidated and renewed motion for remand pursuant to 28 U.S.C. § 1447(c). The issues have been fully briefed, and a hearing was held on February 15, 2002. For the reasons set forth below, the plaintiffs' motion will be denied.

Plaintiffs purport to represent all cell phone purchasers who have not been diagnosed with brain-related diseases, and who were not provided with headsets when they purchased or leased their telephones. They allege that defendants have negligently and fraudulently endangered the consuming public by providing wireless phones without headsets, knowing that these phones emit unsafe levels of radio frequency ("RF") radiation. Rather than seek a traditional tort or contract remedy on behalf of this strangely defined class, however, plaintiffs ask their respective state courts to: (1) declare wireless phones that are in compliance with the FCC's safety regulations on radio frequency emissions "unreasonably dangerous" under state law when sold without headsets; (2) enjoin defendants from selling FCC-compliant wireless phones without headsets; (3) order defendants to provide free headsets to all wireless telephone users; and (4) order defendants to provide "warnings" to consumers about the "dangers" of using FCC-compliant

(Cont'd)

breach of implied warranties; negligence; fraud; fraud by concealment; and civil conspiracy. For purposes of this memorandum, the court will use the *Pinney* complaint as representative of the complaints.

phones. As illustrated by the relief requested, the plaintiffs' suits, though couched in the language of state tort and contract law, have only one goal—to challenge in state court the validity and sufficiency of the federal regulations on radio frequency radiation from wireless phones. Because plaintiffs' suits are a disguised attack on federal law in an area of national importance, the court will exercise jurisdiction over plaintiffs' claims.

I. REMOVAL JURISDICTION

State court actions which originally could have been filed in federal court may be removed to federal court by the defendant pursuant to 28 U.S.C. § 1441. *Caterpillar v. Williams,* 482 U.S. 386, 392 (1987); *Mulcahey v. Columbia Organic Chemicals Company, Inc.,* 29 F.3d 148, 151 (4th Cir. 1994). Section 1441 provides, in pertinent part, that "any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441. Absent diversity of citizenship, the propriety of removal under § 1441 depends on whether the action is one "arising under the Constitution, laws, or treaties of the United States," as set forth by 28 U.S.C. § 1331. *Mulcahey,* 29 F.3d at 151; *Rosciszewski v. Arete Associates, Inc.,* 1 F.3d 225, 230 (4th Cir. 1993).

As the Fourth Circuit has explained:

> In order to determine if an action arises under federal law, we must apply the well-pleaded complaint rule. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). This rule 'provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.' *Id.* Because '[t]he well-pleaded complaint rule applies to the original jurisdiction of the district courts as well as to their removal jurisdiction,' *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 10 n. 9 (1983), a plaintiff 'may avoid federal jurisdiction by exclusive reliance on state law' in pleading its case, *Caterpillar, Inc.*, 482 U.S. at 392.

Rosciszewski, 1 F.3d at 231; *see also J.H.W. Sr., Inc. v. Exxon Co., U.S.A.*, 921 F. Supp. 1436, 1438 (D. Md. 1996).

Ordinarily, therefore, the plaintiff as "the master of his complaint" may select a state forum by choosing to rely on state law claims only, even if the facts alleged also would support a claim under federal law. *See Franchise Tax Bd.*, 463 U.S. at 22; *Cheshire v. Coca-Cola Bottling Affiliated, Inc.*, 758 F. Supp. 1098, 1100 (D.S.C. 1990). While a district court should be cautious in denying defendants access to a federal forum because remand orders are generally unreviewable, *see Cheshire*, 758 F.Supp. at 1100; CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER 14B FED. PRAC. & PROC. JURIS.3D § 3721 at 351-52 (2002), it is

also true that removal jurisdiction raises "significant federalism concerns," and therefore must be strictly construed. *Mulcahey,* 29 F.3d at 151 (*citing Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100 (1941)). The burden of establishing federal jurisdiction is on the party seeking removal. *Id.* (*citing Wilson v. Republic Iron & Steel Co.,* 257 U.S. 92 (1921)). "If federal jurisdiction is doubtful, a remand is necessary." *Id.* (*citing In re Business Men's Assur. Co. of America,* 992 F.2d 181, 183 (8th Cir. 1993)); *see also Cheshire,* 758 F. Supp. at 1102.

Recognizing that the complaint does not on its face allege any federal claims, the defendants seek to invoke three removal doctrines to support federal question jurisdiction: "substantial federal question," "artful pleading," and "complete preemption."[2] The defendants also maintain that, in complying with the FCC's regulations on RF emissions from wireless phones, they were "acting under" a federal officer for purposes of 28 U.S.C. § 1442. The court will address each of defendants' removal arguments in turn.

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2. Throughout their pleadings, plaintiffs assert that the complete preemption doctrine is not properly before the court because defendants failed to mention it in their removal notices. Defendants, on the other hand, argue that by mentioning "preemption" three times, and extensively citing complete preemption caselaw, they have satisfied the minimal notice pleading required. The court need not resolve this dispute, because its decision to exercise jurisdiction is not based on the complete preemption doctrine.

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II. SUBSTANTIAL FEDERAL QUESTION JURISDICTION

"Congress has given the lower federal courts jurisdiction to hear 'only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" *Interstate Petroleum Corp. v. Morgan*, 249 F.3d 215, 219 (4th Cir. 2001) (*en banc*) (*quoting Franchise Tax Bd.*, 463 U.S. at 27); *see also Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 606-07 (4th Cir. 2002). As this court recognized in *Maryland v. Philip Morris Inc.*, 934 F. Supp. 173, 178 (D. Md. 1996), the fact that questions of federal law may need to be determined during the course of state litigation is insufficient to confer federal question jurisdiction under the substantial federal question doctrine. Rather, "the existence of federal question jurisdiction must be determined by 'principled, pragmatic distinctions,' and 'careful judgments about the exercise of federal judicial power'; only where the 'federal interest at stake' is substantial will federal jurisdiction lie." *Custer v. Sweeney*, 89 F.3d 1156, 1168 (4th Cir. 1996) (*quoting Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 813-14, 814 n. 12 (1986)). "[T]he proper test for federal jurisdiction [is] 'the degree to which federal law must be in the forefront of the case and not collateral, peripheral or remote.'" *Mulcahey*, 29 F.3d at 152 (*quoting Merrell Dow*, 478 U.S. at 813 n. 11).

While "the mere presence of a federal issue in a state cause of action does not automatically confer federal question

jurisdiction,"[3] *Merrell Dow*, 478 U.S. at 813, there are a limited number of cases which depend on the resolution of a federal question sufficiently substantial to arise under federal law. *Merrell Dow*, 478 U.S. at 808-09, 106 S.Ct. 3229; *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 806 (4th Cir. 1996) (*citing Franchise Tax Bd.*, 463 U.S. 1, 27-28, 103 S.Ct. 2841); *Mulcahey*, 29 F.3d at 151. Generally, when "'the right set up by [a] party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction,' jurisdiction can be had in federal courts." *Ormet*, 98 F.3d at 806 (*quoting Osborn v. Bank of United States*, 22 U.S. (9 Wheat) 738, 822, 6 L.Ed. 204 (1824)). In reaching such a determination, the Supreme Court has consistently instructed federal courts to make "sensitive judgments about congressional intent, judicial power, and the federal system." *Merrell Dow*, 478 U.S. at 810.[4]

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3. Indeed, federal law creates the plaintiff's cause of action in the vast majority, though not all, of cases involving a substantial federal question. *Merrell Dow*, 478 U.S. at 808 (*citing Franchise Tax Bd.*, 463 U.S. at 9); *see also Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 805 (4th Cir. 1996). The cause of action may be expressly created (*i.e.*, apparent from the language of the statute), or implied. *Merrell Dow*, 478 U.S. at 810-811; *Ormet*, 98 F.3d at 805.

4. Plaintiffs contend that the Supreme Court's decision in *Merrell Dow* precludes application of the substantial federal question doctrine to the present case. The court disagrees. In *Merrell Dow*, the Court considered whether to exercise jurisdiction over a state court action brought by consumers against a drug manufacturer, based in part on the theory that the manufacturer's alleged violation of the Food Drug and Cosmetic Act ("FDCA") constituted negligence. (Cont'd)

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(Cont'd)
Writing for the majority, Justice Stevens articulated the question before the court as "whether the incorporation of a federal standard in a state-law private action, when Congress has intended that there not be a federal private action for violations of that federal standard, makes the action one 'arising under the Constitution, laws, or treaties of the United States,'" for the purposes of federal jurisdiction. *Merrell Dow*, 478 U.S. at 805 (*quoting* 28 U.S.C. § 1331). Noting that Congress did not intend a private federal remedy for violations of the FDCA, *id.* at 810, the Supreme Court summed its holding in *Merrell Dow* in this manner:

> We simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal question jurisdiction.

Merrell Dow, 478 U.S. at 814.

In the present case, however, plaintiffs have not challenged the "violation of a federal statute." Rather, they dispute the sufficiency of the regulations carrying out the statute itself. Congress has provided several federal causes of action that protect plaintiffs' right to do so. A cause of action is available to plaintiffs, for example, under the FCC's rules of practice and procedure, which provide that "[a]ny interested person may petition for the issuance, amendment, or repeal of a rule or regulation." 47 C.F.R. § 1.401(a). Since federal appellate courts have exclusive jurisdiction over the review of FCC rules and orders, judicial review of an FCC decision declining to impose stricter safety regulations, such as a headset requirement, would be conducted in federal court. 47 U.S.C. § 402(a); 28 U.S.C.
(Cont'd)

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The defendants argue that removal is warranted because the plaintiffs' claims will require the resolution of substantial questions of federal law under the Federal Communications Act of 1934 ("FCA"), 47 U.S.C. § 151, *et. seq.* The court agrees. In the FCA, Congress explicitly instructed the FCC to set national standards regulating the levels of radio frequency emitted from telecommunication facilities. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), § 704(b). As a result, after notice and lengthy public proceedings, the FCC promulgated safety regulations that clearly and specifically delineate the levels of RF emissions that will be allowed from wireless phones:

> Limits for General Population/ Uncontrolled exposure: 0.08 W/kg as averaged over the whole-body and spatial peak SAR not exceeding 1.6 W/kg as averaged over any 1 gram of tissue (defined as a tissue volume in the shape of a cube).

(Cont'd)

§ 2342(1). Section 10(a) of the Administrative Procedures Act ("APA") also provides plaintiffs a federal remedy by allowing private citizens to challenge an agency's NEPA compliance in federal district court. *See, e.g., Sierra Club v. Slater,* 120 F.3d 623, 630-31 (6th Cir. 1997); *Muhly v. Espy,* 877 F. Supp. 294, 298 (W.D.Va.1995). Although these provisions may not provide the plaintiffs with a cause of action against these defendants, they demonstrate Congressional intent to support the plaintiffs' right to adequate protection from unsafe levels of RF radiation, which is, as discussed more fully elsewhere in this memorandum, the *only* interest at stake in this litigation. Thus, to the extent that *Merrell Dow's* requirement of a federal private remedy is applicable, *see Mulcahey,* 29 F.3d at 152, it is met in the present case.

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> Exceptions are the hands, wrists, feet and ankles where the spatial peak SAR shall not exceed 4 W/kg, as averaged over any 10 grams of tissue (defined as a tissue volume in the shape of a cube).

47 C.F.R. 2.1093(d)(2). Defendants must comply with the RF safety requirements in 47 C.F.R. 2.1093(d)(2) in order to make their phones available to the public.

In determining whether plaintiffs' claims necessarily depend on substantial issues of federal law, the court must consider the allegations made and relief requested in plaintiffs' complaints. Before doing so, however, the court will discuss the comprehensive nature of federal regulation of wireless service to put the matter before it in context.

1. Federal Regulation of RF Emissions from Wireless Phones

Congress asserted federal control over all interstate wire and radio communications systems and established the Federal Communications Commission ("FCC" or "the Commission") as the sole authority for licensing radio facilities and regulating the technical aspects of radio communications in the Federal Communications Act of 1934 ("FCA"), 47 U.S.C. § 151. *See In re An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems,* 86 F.C.C.2d 469, ¶ 80, 1981 WL 158543 (1981) (Def. Appendix, Tab 1) (hereinafter "*Cellular Communications Systems* ") ("In enacting such legislation Congress has determined that overall management of the radio spectrum and the licensing of radio facilities are areas

within the exclusive jurisdiction of the Federal government."). Pursuant to this exclusive authority, the FCC has issued licenses and set the technical standards for wireless telecommunications since the inception of commercial wireless telephone service. *See Cellular Communications Systems*, ¶¶ 86- 115; 47 C.F.R. § 20.3. The FCC currently licenses all equipment used to provide wireless service, including wireless hand-held telephones, and regulates the radiated power levels from all licensed devices, both stationary and portable. 47 C.F.R. §§ 2.901, 1.1307, 2.1093, 2.1091.

In promulgating licensing and technical rules to govern wireless service, one of the FCC's overriding goals is to design cellular service in a manner that will achieve nationwide compatibility. *Cellular Communications Systems*, ¶ 79. "In this regard [the FCC] has expressly stated that a cellular subscriber traveling outside of his or her local service area should be able to communicate over a cellular system in another city." *Id.* Recognizing the danger that piecemeal state regulation might pose to this endeavor, the FCC has established "federal primacy over the areas of technical standards and competitive market structure for cellular service." *Id.* at ¶¶ 79, 82.[5] The FCC's technical standards are intended to produce "compatible operation of equipment on both local and national levels," and promote "signal quality and other quality aspects of system performance." *Cellular Communications Systems*, ¶ 84. Thus, regulation of wireless service typically revolves around matters such as the

5. The FCC continued to recognize a "complementary" role for state certification of carriers. *Cellular Communications Systems*, ¶ 83.

allocation of frequencies, height and power of antenna base stations, and radiation power of mobile units such as wireless phones. *Id.* at ¶¶ 87-95.

To further encourage the rapid deployment of uniform wireless services, Congress began to develop a system of federal telecommunications regulation in the 1993 amendments to the FCA. *See* Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103-66, § 6002, 107 Stat. 312, 387-97 (1993) ("OBRA" or the "1993 Amendments"); *In re Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut,* 10 F.C.C. Rcd. 7025, ¶¶ 2, 10, 1995 WL 316493 (1995), *review denied,* 78 F.3d 842 (2d Cir. 1996). First, Congress revised Section 2(b) of the Act to *exclude* wireless services from the prohibition on federal regulation of intrastate communications. *See* 47 U.S.C. § 152(b). Second, Congress amended 47 U.S.C. § 332 to give the FCC exclusive authority over the regulation of the rates charged by and market entry of mobile service providers. OBRA, § 6002(b)(2)(A), 107 Stat. 312, 394 (1993), *codified at* 47 U.S.C. § 332(c)(3)(A). Congress intended these changes to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." H.R. Rep. No. 111, 103RD Cong., 1st Sess. 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587 (Def. Appendix, Tab 2).

In the Telecommunications Act of 1996 ("FTA" or the "1996 Amendments"), Pub.L. No. 104-104, 110 Stat. 56,

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Congress revisited the FCA by directly prohibiting state and local regulation of "the placement, construction, and modification of personal wireless service facilities" on the basis of concerns about radio frequency radiation. 47 U.S.C. § 332(c)(7)(B)(iv). As a result,

> Pursuant to Section 332(c)(7), and consistent with the Commission's general authority to regulate the operation of radio facilities, State and local governments are broadly preempted from regulating the operation of personal wireless service facilities based on RF emission considerations. Thus, for example, a local government may not require a facility to comply with RF emissions or exposure limits that are stricter than those set forth in the Commission's rules, and it may not restrict how a facility authorized by the Commission may operate based on RF emissions or any other cause.

In re Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934, Report and Order, 15 FCC Rcd. 22, 821, ¶ 17(2000) (Def. Appendix, Tab 3). According to the relevant Congressional report:

> The Committee finds that the current State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services

> (PCS) as well as the rebuilding of a digital technology-based cellular telecommunications network. The Committee believes it is in the national interest that uniform, consistent requirements, with adequate safeguards of the public health and safety, be established as soon as possible.

H.R. Rep. No. 104-204, 104TH Cong., 2d Sess. 94 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 61 (Def.Appendix, Tab.5). To "insure an appropriate balance in policy," *id.*, Congress instructed the FCC to prescribe rules regarding the environmental effects of radio frequency emissions within 180 days of the enactment of the 1996 Amendments. Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (1996), § 704(c).

While the 1996 Amendments were being debated, the FCC was already in the process of determining whether to update its radio frequency radiation regulations.[6] After notice

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6. Although the FCC did not initially consider itself responsible for evaluating and controlling the environmental impact of radiation from wire-line technology and radio communications, the agency adopted guidelines for limiting electromagnetic radiation emissions from televisions, telephones, radios, and various antennae after the passage of the National Environmental Policy Act ("NEPA") of 1969. Pub.L. No. 91- 190, 83 State 852 (codified at 42 U.S.C. § 4321, *et. seq.* (1994)) (requiring federal agencies to examine and address the environmental effects of their policies). From 1985 to 1991, the FCC limited RF emissions from wireless service facilities in accordance with the standards promulgated by the American National Standards Institute ("ANSI"), which is "internationally recognized (Cont'd)

and an extensive period for the submission of public comment, the FCC issued Release No. 96-326 (the "*FCC First Order* ") on August 1, 1996. *See In re Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation,* Release No. 96-326, 11 F.C.C.R. 15123, 1996 WL 926565 (1996) (Def. Appendix, Tab 8.) Release No. 96-326 articulates a specific absorption rate ("SAR") that wireless phones may not exceed,[7] and currently applies to all wireless phones sold in the United States. *See* 47 C.F.R. §§ 1.1307, 2.1091, 2.1093.[8] According to the FCC, the limits set by

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for [its] expertise in this area." *In re Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(iv) of the Communications Act of 1934,* Release No. 97-303, ¶ 32 (August 25, 1997) (the "*FCC Second Order* ") (Def. Appendix, Tab 6). ANSI replaced its standards with a more stringent set in 1992. *In re Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation,* 8 F.C.C.R. 2849, ¶ 6, 1993 WL 757412 (1993) (Def. Appendix, Tab 7). The FCC issued a public notice that it was considering amending its guidelines to reflect the ANSI changes in 1993. *Id.*

7. "SAR is a measure of the rate of energy absorption due to exposure to an RF transmitting source." 47 C.F.R. § 2.1093(d).

8. One year after these regulations were issued, the FCC amended them in response to petitions for reconsideration. *In re Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934,* Release No. 97-303, ¶ 12 (August 25, 1997) (Def. Appendix, Tab 6) (the "*FCC Second Order* "). These amendments did not, however, alter the mandate of the *First Order* as it related to wireless phones. In fact, the *Second Order* specifically affirmed the RF exposure limits articulated by the FCC in the *First Order. FCC Second Order,* ¶¶ 2, 39.

Release No. 96-326 are "one fiftieth of the point at which RF energy begins to cause any unhealthful thermal effect." *Cellular Phone Taskforce v. FCC*, U.S. Sup. Ct. No. 00-393, Brief for the Respondents in Opposition [to Petition for Writ of Certioriari], p. 3 (Dec.2000) (hereinafter "*FCC Brief* ") (Def. Appendix, Tab 4) (*citing* National Council on Radiation Protection and Measurements, *Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields*, NCRP Report No. 86, at 279-283 (1986)).

The FCC's RF guidelines have been criticized because of the agency's acknowledged lack of expertise over public health and safety matters. In response, the FCC has stated:

> To be sure, the [FCC] 'does not have the expertise to make independent judgments on such alleged health effects as 'electrosensitivity' or other reported effects on human health. This is the responsibility of the federal health and safety agencies.' RF Reconsideration Order, 12 F.C.C.R. at 13, 538. As the agency acknowledged when it first implemented RF exposure rules, it lacks expertise to '*develop* our own radiation exposure guidelines,' but 'does have the expertise and authority to *recognize* technically sound standards promulgated by reputable and competent organizations such as ANSI.' 100 F.C.C.2d at 551. Moreover, the FCC consulted extensively with EPA, FDA, OSHA and other federal health and safety agencies, all of which concurred in the final standard. RF Order, 11 F.C.C.R. at 13, 538. EPA in particular had been working on its own set of

> RF exposure rules and it had extensive familiarity with the scientific and medical literature. Pet.App. A10. In short, the RF regulations culminated from a multi-disciplinary, multi-agency effort in which the FCC took the lead.

FCC Brief, 21-22 (Def. Appendix, Tab 4) (emphasis in original).[9] The FDA's involvement was particularly important because of its authority over radiation emitting products pursuant to the Electronic Product Radiation Control Act. *See* 21 U.S.C. § 360ii.[10] Under the advisement of the FDA,

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9. With regard to the collaborative process used in adopting the current RF guidelines, the FCC also has stated:

> In reaching our decision on the adoption of new RF exposure guidelines we have carefully considered the large number of comments submitted in this proceeding, and particularly those submitted by the U.S. Environmental Protection Agency (EPA), the Food and Drug Administration (FDA) and other federal health and safety agencies. The new guidelines we are adopting are based substantially on the recommendations of those agencies, and we believe that these guidelines represent a consensus view of the federal agencies responsible for matters relating to the pubiic safety and health.

FCC First Order, ¶ 2.

10. The FCC emphasized its deference to other federal health and safety agencies in both the *First* and *Second Orders*:

> Although most commenting parties generally support our proposal to adopt the 1992 ANSI/IEEE guidelines, some

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for example, the FCC declined to adopt the ANSI/ IEEE radiated power exclusion, which would have exempted wireless phones and other low-power devices from having to comply with federal RF safety standards. *FCC First Order*, ¶¶ 49, 71; *FCC Second Order*, ¶ 30.[11] The FDA has

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> of the Federal agencies filing comments in this proceeding, principally those with responsibility for oversight regarding health and safety issues, object to the use of certain aspects of these guidelines. In the past, the Commission has stressed repeatedly that it is not a health and safety agency and would defer to the judgment of these expert agencies with respect to determining appropriate levels of safe exposure of RF energy. We continue to believe that we must place special emphasis on the recommendations and comments of Federal health and safety agencies because of their expertise and their responsibilities with regard to health and safety matters.

FCC First Order, ¶ 28.

> With regard to DOD's claim that our proposal was not properly coordinated with other agencies, we note that our proposal was coordinated with the federal agencies with health and safety responsibilities. These agencies include the EPA, the FDA, the National Institute for Occupational Safety and Health (NIOSH), and the Occupational Safety and Health Administration (OSHA). Each of these agencies sent letters to the FCC supporting our action.

FCC Second Order, ¶ 37.

11. The FDA has acknowledged its role in the multi-agency approach to regulating the safety of wireless phones: "The FDA

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characterized the RF requirements as "a significant step towards achieving a consensus guideline on RF exposure which will have the support of the federal agencies responsible for protecting the public from nonionizing radiation injury." (Letter from Elizabeth D. Jacobson, Ph.D., Deputy Director for Science, FDA Center for Devices and Radiological Health, to Richard M. Smith, Chief of the FCC Office of Engineering and Technology, dated July 17, 1996 (Def. Appendix, Tab 9).)[12] Thus, the national RF requirements

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shares regulatory responsibilities for wireless phones with the [FCC]. All phones that are sold in the United States must comply with FCC safety guidelines that limit RF exposure. FCC relies on FDA and other health agencies for safety questions about wireless phones." U.S. Food and Drug Administration, *Consumer Update on Wireless Phones*, July 18, 2001, *available at* www.fda.gov/cdrh/oca/mobilphone.html (Def. Appendix, Tab 11.)

12. According to the FCC, the EPA also supports this "consensus" view of the RF guidelines.

> [The] EPA has recently informed the [FCC] that "[t]he information base on non-thermal effects has not changed significantly since the EPA's original comments in 1993 and 1996. The majority of currently available studies suggests that there are no significant non-thermal human health hazards. It therefore continues to be EPA's view that the FCC exposure guidelines adequately protect the public from all scientifically established harms that may result from RF energy fields generated by FCC licensees."

FCC Brief, 23 n. 12 (*quoting* Letter from Robert Brenner, Acting Deputy Asst. Administrator for Air and Radiation, to Dale Hatfield, Chief, FCC Office of Engineering and Technology, dated April 30, 1999) (Def. Appendix, Tab 4.)

represent an inter-agency collaborative federal effort, mandated by Congress and spearheaded by the FCC, to achieve "a proper balance between the need to protect the public and workers from exposure to excessive RF electromagnetic fields and the need to allow communication services to readily address growing marketplace demands."[13] *FCC Second Order*, ¶ 29.

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13. Both the FDA and the FCC have publicly reaffirmed their belief that existing scientific data does not indicate that FCC-compliant wireless phones are biologically harmful. *See, e.g.*, U.S. Food and Drug Administration, Center for Devices and Radiological Health, Consumer Update on Mobile Phones (Oct. 20, 1999) (Appendix, Tab 13). The latest FCC consumer information pamphlet states:

> **Cell Phones and Your Health**
>
> . . . The FCC requires cell phone manufacturers to ensure that their phones comply with [the FCC's] objective limits for safe exposure. Any cell phone at or below these SAR levels (that is, any phone legally sold in the U.S.) is a "safe" phone as measured by these standards . . .
>
> There is no scientific evidence to date that proves that wireless phone usage can lead to cancer or other adverse health effects, such as headaches, dizziness, elevated blood pressure, or memory loss. However, studies are ongoing, and key government agencies such as the FDA continue to monitor the results of the latest scientific research on this topic. *See* FDA Web site at www.fda.gov/cdrh/phones. Also, the World Health Organization (WHO) has established an ongoing program to monitor research in this area and make

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2. Plaintiffs' Claims

To determine whether plaintiffs' right to relief necessarily depends on a substantial federal question, the court must examine the plaintiffs' complaints. In *Pinney*, plaintiffs acknowledge that defendants are licensed by the FCC to provide wireless phones, and that the phones are manufactured in accordance with these licenses and other information provided by the FCC. (*See Pinney* at ¶¶ 50-52). Nonetheless, plaintiffs claim that defendants have (1) failed to warn consumers about adverse health risks associated with RF emissions from wireless phones (*id.*, "COUNT I–STRICT PRODUCT LIABILITY–FAILURE TO WARN," ¶¶ 88-100); (2) knowingly placed defective and unreasonably dangerous products in the stream of commerce by selling and activating wireless phones without headsets (*see Pinney*, "COUNT II–STRICT PRODUCT LIABILITY–DESIGN OR MANUFACTURING DEFECT," ¶¶ 101-109); (3) engaged in deceptive acts and practices by "making false and misleading oral and written statements" about the safety of wireless phones in violation of Maryland's Consumer Protection Act, Md. Com. Law Code Ann. § 13-101, *et. seq.* (*id.*, "COUNT III—VIOLATIONS OF MARYLAND CONSUMER PROTECTION ACT," ¶¶ 110-114);[14]

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recommendations related to the safety of mobile phones. See WHO Web site at www.who.int/peh-emf.

Market Sense, Cell Phones: Facts, Fiction, Frequency, available at http:// www.fcc.gov/cib/cell_phones.html (Appendix, Tab 10).

14. The *Farina* Complaint alleges violations under Pennsylvania's Unfair Trade Protection and Consumer Protection (Cont'd)

(4) breached implied warranties of merchantability by knowingly selling and distributing unreasonably dangerous wireless phones (*id.*, "COUNT IV–BREACH OF IMPLIED WARRANTIES," ¶¶ 115-121); (5) negligently designed, manufactured, tested, marketed, distributed, and/or sold the wireless phones to the public (*id.*, "COUNT V–NEGLIGENCE," ¶¶ 122-133); (6) fraudulently "misinformed, misled, and deceived" consumers into believing in the safety of the wireless phone (*id.*, "COUNT VI–FRAUD" and "COUNT VII–FRAUD BY CONCEALMENT," ¶¶ 84, 133-149); and (7) conspired to market unsafe wireless phones by improper and wrongful means (*id.*, "COUNT VIII–CIVIL CONSPIRACY," ¶¶ 150-163). In plaintiffs' view, any statements by defendants portraying the phones as "safe" because they comply with FCC standards are fraudulent and deceitful because "the FCC ha[s] declared that it does *not* consider itself the 'expert agency' for evaluating the health effects" of radio frequency radiation. (*See id.* at ¶¶ 53, 79.) To bolster this position, plaintiffs suggest that such safety "advertisements" have been challenged by the FDA. (*Pinney* at ¶ 80 (*citing* Letter from Elizabeth Jacobson, Deputy Director of the Food & Drug Administration's Center for Devices and Radiological Health, dated July 19, 1993).) Plaintiffs further claim that defendants, both individually and collectively, have conspired to exercise improper influence over the American National Standards Institute, the organization responsible for developing the

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Law, and the *Gilliam* Complaint alleges violations under New York's Consumer Protection for Deceptive Products Act. The *Gimpelson* and *Naquin* Complaints allege only Georgia and Louisiana common law theories of liability, respectively.

RF safety guidelines upon which the national standards are based. (*Id.* at ¶¶ 71-75.) These allegations put the validity of the federal regulations, and the process by which they were developed, directly into dispute.

Although none of these claims explicitly challenge the FCC's radiation exposure guidelines, an examination of the class plaintiffs propose and the remedy plaintiffs request reveals that the true gravamen of these complaints is to attack the lack of a headset requirement under the federal RF safety rules. Plaintiffs seek to represent all present and future cell phone users who have not been diagnosed with the injuries wireless phones supposedly generate.[15] (*Pinney*, "CLASS

15. Paragraph 42 of the *Pinney* Complaint states:

> 42. The named Plaintiffs bring this class action on behalf of themselves and all other persons similarly situated for the purpose of asserting the claims alleged on a common basis.

The proposed class is defined as:

> (a) All purchasers or lessees of WHHPs ("wireless hand-held phones") who are residents of the State of Maryland, and who were residents of the State of Maryland when they purchased or leased a WHHP, who have not been diagnosed with a brain related tumor or cancer of the eye and who were not furnished a headset at the time they purchased or leased their WHHP; and
>
> (b) All future purchasers of WHHPs who are residents of the State of Maryland and who have not been diagnosed with a brain related tumor or cancer of the eye.

ACTION ALLEGATIONS," ¶ 42.) The only relief they request is for the court to force defendants to provide them with headsets, either through compensatory damages or prohibitory injunctions.[16] (*See Pinney*, ¶¶ 100(a)-(h), 109(a)-

16. In the *Pinney* Complaint, the plaintiffs pray for the following relief:

> a. For compensatory damages including but not limited to amounts necessary to purchase a WHHP headset for Plaintiff J. Douglas Pinney and for each Class Member;
>
> b. Reimbursing Plaintiff Patricia S. Colonell and for each Class Member purchaser or lessee of a WHHP the cost incurred in purchasing or acquiring a headset;
>
> c. Providing each Class member who has not been so provided a WHHP that can be used with a headset;
>
> d. Providing each Class member with instructions for the use of a headset, as well as reasons why a headset should be used;
>
> e. For punitive damages to Plaintiffs and other members of the Class;
>
> f. For injunctive relief preventing the future sale of WHHPs without headsets and appropriate instructions and warning;
>
> g. For costs, attorney fees, and legal pre-judgment interest; and
>
> h. An Order certifying the Class and appointing the Plaintiffs and their counsel to represent the Class.

(*Pinney*, ¶ 100(a)-(h).)

(h), 114(a)-(g), 121(a)-(g), 133(a)-(h), 142(a)-(h), 149(a)-(h), 163(a)-(h).) Any court faced with such a class and requested remedy necessarily must evaluate whether the FCC has been authorized by Congress to act as the final authority on the regulation of RF emissions from wireless phones, and whether the current RF requirements promulgated by the FCC adequately protect the public's health. Indeed, the FCC has already considered and rejected a headset requirement.[17] Thus, a state imposed headset rule necessarily invalidates the national standard. A suit to invalidate a federal regulation as unreasonable arises under federal law. *See Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998) ("A tariff filed with a federal agency is the equivalent of a federal regulation, and so a suit to enforce it, and even more clearly a suit to invalidate it as unreasonable under federal law . . . arises under federal law.") (citations omitted); *see also Marcus*, 138 F.3d at 55-56 (upholding removal of a breach of warranty claim against AT & T under the substantial federal question doctrine because the tariff that the claim was based upon had the force of federal law).

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17. In response to the question "Do hands-free kits [*i.e.*, headsets] for wireless phones reduce risks from exposure to RF emissions?," the FCC and the FDA state: "Since there are no known risks from exposure to RF emissions from wireless phones, there is no reason to believe that hands-free kits reduce risks. . . . Wireless phones marketed in the U.S. are required to meet safety requirements regardless of whether they are used against the head or against the body. Either configuration should result in compliance with the safety limit." *See* FDA & FCC, *Cell Phone Facts, Consumer Information on Wireless Phones, available at* http:// www.fda.gov/ cellphones/qa.html. (*See also* Letter to Court from Def. re: "In re Wireless Telephone Radio Frequency Litigation," dated May 6, 2002, pp. 1-2.)

Appendix C

The Second Circuit recently rejected a suit to invalidate the FCC's RF regulations in *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001). The similarities between *Cellular Phone Taskforce* and the present case cannot be ignored. In *Cellular Phone Taskforce*, two consumer groups challenged the FCC's standards on RF emissions in federal court. These groups contended, as the plaintiffs do here, that the current federal RF regulations do not adequately protect the public from the "non-thermal effects of RF radiation."[18] Instead of requesting

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18. In the present case, plaintiffs assert that the ANSI standards defendants complied with in manufacturing their phones before 1989 were "based solely on the *thermal* effects associated with RFR and did not contemplate or consider the possibility that RFR exposure could give rise to non-thermal biological injury and subsequent adverse health effects." (*Pinney* Complaint, ¶ 72.) In their Motion to Remand, plaintiffs further declare:

> The FCC has set guidelines for the thermal effects of environmental exposure to RF emissions from WHHPs. It does not regulate the non-thermal biological effects of RF radiation upon human brain tissue of the immediate user—the subject of these actions.

(*See* Pl. Mot. to Remand, p. 11 (*citing Cellular Phone Taskforce*, 205 F.3d at 90-92).)

In *Cellular Phone Taskforce*, however, the Second Circuit stated, "In promulgating their standards, both the ANSI and the NCRP considered non-thermal effects." *Cellular Phone Taskforce*, 205 F.3d at 90. Upon review of their conclusions, the court found that "[a]t most, the newly submitted evidence established that the existence of non-thermal effects is 'controversial,' and that room for

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a headset, however, plaintiffs in *Cellular Phone Taskforce* argued that the FCC should have created greater safety margins to account for scientific uncertainty about RF emissions. *Id.* at 90-91. Characterizing this as "a policy question, not a legal one," *id.*, the Second Circuit remarked:

> The FCC concluded that requiring exposure to be kept as low as reasonably achievable in the face of scientific uncertainty would be inconsistent with its mandate to 'balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible.' This policy conclusion is neither irrational, arbitrary nor capricious and we decline to disturb it.

Id. at 92.

Congress's primary goal in regulating wireless service is to develop a seamless and ubiquitous national system of wireless communications.

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disagreement exists among experts in the field." *Id.* Concluding that the FCC's reliance on ANSI and NCRP was "reasonable" and "justified," *id.* at 90-91, the Second Circuit upheld the federal regulations. Thus, any assertion that the FCC does not consider the non-thermal effects of radio frequency radiation appears to be incorrect.

Appendix C

> The RF exposure rules govern the activities of entities that are licensed and heavily regulated by the FCC. Congress has charged the FCC with 'making available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communications service,' 47 U.S.C. 151 (1994 & Supp. IV 1998), has declared it 'the policy of the United States to encourage the provision of new technologies and services to the public,' 47 U.S.C. 157(a), and has established procedures to ensure the 'efficient and intensive use of the electromagnetic spectrum,' 47 U.S.C. 309(j)(3)(D) (Supp. IV 1998). There is a trade-off between those goals and public exposure to RF energy: all risk from RF energy could be eiiminated by prohibiting wireless communications technologies. Congress has entrusted to the FCC the process of striking the appropriate balance, a subject squarely within the agency's expertise.

FCC Brief at 21. The current federal requirements reflect carefully considered judgments by Congress, FCC, FDA, EPA, NIOSH, and OSHA about the appropriate method of balancing these concerns. As the Fourth Circuit recognized in *Ormet*, "[w]here the resolution of a federal issue in a state-law cause of action could, because of different approaches and inconsistency, undermine the stability and efficiency of a federal statutory regime, the need for uniformity becomes a substantial federal interest, justifying the exercise of jurisdiction by federal courts." *Ormet*, 98 F.3d at 807 (*citing Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 347-48

(1816) (Story, J)).[19] While state courts ultimately might

19. Plaintiffs argue that *Ormet* is "neither 'controlling' nor instructive" because it is not a removal case. (*See* Pl. Reply, p. 2). At the same time, however, plaintiffs rely on *Fair v. Sprint Payphone Services, Inc.*, 148 F.Supp.2d 622, 626 (D.S.C.2001), to support their argument that remand is proper in the present case. In *Fair*, the families of inmates sued the state of South Carolina in state court, alleging that it had violated state law by entering into contracts for inmate payphone services which charged family members uncompetitive rates. *Id.* at 624. Defendants argued that removal was proper because the FCA gives the FCC authority to regulate payphone compensation plans. *Id.* Finding the FCC's actual regulations on payphone compensation plans to be less than comprehensive, the court declined to exercise jurisdiction solely on the basis of an authority to regulate, and remanded the case to state court. *Id.* at 625. On the propriety of remand, therefore, *Fair* is easily distinguishable from the present litigation. In contrast to the FCC's regulation of payphone compensation plans, the FCC has fully and comprehensively regulated radio frequency radiation from telecommunications facilities, as is extensively discussed throughout this memorandum. With regard to plaintiffs' assertion about the applicability of *Ormet*, the court notes that *Fair* took pains to distinguish *Ormet*, explaining that, unlike *Ormet*, the "state court will not need to interpret any core term of section 276 [of the Telecommunications Act] to decide whether the plaintiffs' claims can succeed." *Id.* at 626. Thus, while not a removal case, *Ormet* is relevant to this court's determination of whether to exercise federal jurisdiction based on the substantial federal question doctrine. *See also* WRIGHT, MILLER, & COOPER, *supra*, § 3722 at 384-85 ("[I]t is quite appropriate to construe the provision in the removal statute in a manner that calls for the application of the general principles governing original federal question jurisdiction to the removal of state cases that involve questions of federal law. . . . Generally then, federal removal jurisdiction based on Section 1441(b) embraces the

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conclude that they are preempted from regulating the wireless industry on the basis of RF concerns, the risk of fifty different states articulating fifty different rules about whether and to what extent they may set RF safety standards could create market instability and prevent the maintenance of an unimpeded national network of rapid and efficient telecommunications service, a goal of significant importance to national commerce and security. With these federal interests figuring so centrally to plaintiffs' case, removal is fully justified.

Removal might not be warranted if plaintiffs could prevail without a court evaluating the validity and sufficiency of the federal standards. "[I]f a claim is supported not only by a theory establishing federal subject matter jurisdiction but also by an alternative theory which would not establish such jurisdiction, then federal subject matter jurisdiction does not exist." *Mulcahey*, 29 F.3d at 153 (*citing Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 811 (1988)); *Danfelt v..Bd. of County Commissioners, Washington County*, 998 F. Supp. 606, 609-10 (D. Md.1998). Here, however, the central premise of each count of each complaint is that federal safety regulations governing wireless hand-held phones permit the sale of a product that is unreasonably dangerous

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same class of cases as is covered by Section 1331, the original federal question jurisdiction statute."). *Ormet* is therefore both relevant and persuasive authority, as this court must apply the law of the Fourth Circuit in considering cases referred to it by the MDL panel. *See In re Microsoft Corp. Antitrust Litig.*, 127 F.Supp.2d 702, 718 n. 15 (D.Md.2001) (*citing In re Am. Honda Motor Co. Dealerships Relations Litig.*, 941 F.Supp. 528, 536-37 (D.Md.1996)).

to consumers. The only way a court can resolve this dispute and possibly grant plaintiffs the remedy they seek is for it to pass judgment on the validity of the federal RF standards.[20]

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20. At the hearing held before the court on February 15, 2002, plaintiffs conceded that the only relief they seek is a judicial requirement that defendant cell phone manufacturers must provide headsets with wireless phones. This is illustrated by the following dialogue between the court and plaintiffs' counsel:

Mr. Howell: . . . [Defendants] particularly are interested in the injunctive relief that is sought. It may well be that the wide-ranging prohibitory injunction might run afoul of federal law. That's obviously a defense that has to be honored if there is such a conflict by the state courts that decide the case.

Court: Then what would you have left? I mean assuming that in light of provisions under the Communications Act about entry for wireless service facilities and in light of the fact that it says that you can't, state and local government can't regulate on the basis of environmental effects of radio frequency emission, I mean if you kick out the injunctive relief, what isleft in the state court cases?

Mr. Howell: There is a request for compensatory damages. There's –

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Appendix C

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Court: What sort of compensatory damages? Isn't it compensatory damages to buy headsets?

Mr. Howell: The cost of a headset which is I can say with some certainty is worth $19.99 per plaintiff. That is the basic relief. Whether a state court would have to go beyond that relief and say you're enjoined, I think is probably a question that is fairly debatable. Why would a court that orders full relief in the monetary form, you know, why would defendants object to such an award assuming its validity? Why would a defendant again fail to provide headsets? Certainly a state court would be reluctant to enjoin practices that have not yet occurred. You know, it might be some kind of supplemental relief. It could also be narrowly drawn. . . .

Court: The only damages you're telling me about are the cost of headsets –

Mr. Howell: Right.

Court: – which, to the extent that you're purporting to have a class of people that [is] going to proceed into the future, I mean I don't see exactly how you do that other than in some

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Defendants have the right to have such an evaluation take place in federal court. The court will therefore deny plaintiffs' motion to remand.

III. ARTFUL PLEADING

Under the doctrine of "artful pleading," a court is permitted to look behind a complaint to determine whether a plaintiff is attempting to conceal the federal nature of his claim by fraud or obfuscation. *Philip Morris Inc.*, 934 F.Supp. at 175. The application of artful pleading is "most appropriate in cases where federal law altogether preempts and supplants state law, but plaintiff seeks to avoid the effect of preemption by pleading only state causes of action." *See id.* at 175 (*quoting Cheshire v. Coca-Cola Bottling Affiliated, Inc.*, 758 F. Supp. 1098, 1100 (D.S.C. 1990)). In 1998, the Supreme Court stated in *Rivet v. Regions Bank of Louisiana:* "[T]he artful pleading doctrine allows removal where federal law

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> injunctive form. But isn't it in substance anyway the same thing as injunctive relief? I mean if you're telling the people that sell the wireless phone that they must provide headsets or money to buy them –
>
> Mr. Howell: Yeah. . . .

(*See In re Wireless Telephone Radio Frequency Products Liability Litigation*, Civ. No. 01-MD-1421, Transcript of Motion to Remand Before Judge Catherine C. Blake, February 15, 2002, pp. 15-18.)

completely preempts a plaintiff's state-law claim." 522 U.S. 470, 475.

Since *Rivet*, some courts have concluded that artful pleading cannot exist absent complete preemption. *See Waste Control Specialists, LLC v. Envirocare of Texas, Inc.*, 199 F.3d 781, 783 (5th Cir. 2000) ("Without complete preemption, the artful pleading doctrine does not apply."); *Goepel v. National Postal Mail Handlers Union*, 36 F.3d 306, 311 n. 5 (3rd Cir. 1994) ("[Complete preemption] has been referred to elsewhere as the 'artful pleading' doctrine, under which a court will not allow a plaintiff to deny a defendant a federal forum when the plaintiff's complaint contains a federal claim 'artfully pled' as a state law claim.") (citation omitted). Others, including one court within this circuit, have declined to read into *Rivet* an intention by the Supreme Court to collapse artful pleading and complete preemption into a single rule. *See Reveal v. Stinson*, 115 F. Supp.2d 688, 690 n. 2 (S.D.W.Va.2000).

Past precedent indicates that artful pleading requires the presence of either complete preemption *or* "'a state cause of action the merits of which turn on an important federal question.'" *Id.* at 690 (citations omitted). As noted in *Reveal*, it would be inappropriate to assume that the Supreme Court in *Rivet* overruled *sub silentio* "a landmark line of cases that have guided the determination of federal jurisdiction for many decades." *Reveal*, 115 F.Supp.2d at 690 n. 2; *see also* 14B WRIGHT, MILLER, & COOPER, *supra*, § 3722 at 447.

Rather than characterizing artful pleading as a separate "removal doctrine," however, the term may more accurately

be used to describe the manner in which some plaintiffs, such as those presently before the court, manage to plead claims that are actually federal (because they are either completely preempted, or based entirely on substantial federal questions) under state law. In such cases, a court need not "blind itself to the real gravamen of [the] claim." *Philip Morris,* 934 F. Supp. at 176 (*quoting In re Wiring Device Antitrust Litig.,* 498 F. Supp. 79, 82 (E.D.N.Y.1980)). Plaintiffs' proposed class represents the same interests as the consumer groups in *Cellular Phone Taskforce*—both sets of plaintiffs are uninjured users of wireless phones seeking stricter limits on radio frequency emissions. Unlike the *Cellular Phone Taskforce* plaintiffs, however, the plaintiffs in this litigation want reconsideration of the federal standards to occur in state court. In other words, rather than directly attack the federal requirements in the appropriate forum, plaintiffs are attempting to circumvent the FCA's comprehensive regulatory scheme by pursuing stricter safety measures, *i.e.,* the addition of headsets, under state tort law.

Ordinarily, as "masters of the complaint," plaintiffs may plead their claims within the confines of state law, if they so choose. Recognizing the unlikelihood of success in federal court given the Second Circuit's determination in *Cellular Phone Taskforce,* however, plaintiffs have impermissibly structured this litigation to avoid the uniform determination of RF safety in a federal forum by simultaneously bringing substantially similar actions in a variety of state courts. Plaintiffs may not deny defendants their right to have decisions concerning RF safety made in a federal forum by labeling their claims exclusively under state law in order to conceal the existence of a substantial federal question. Nor

may plaintiffs "deliberately obscure[ ] the true nature of their claims in an attempt to proceed with their action in state court without the restrictions imposed by the comprehensive regulatory scheme embodied in the Communications Act." *In re Comcast Cellular Telecommunications Litigation*, 949 F. Supp. 1193, 1204 (E.D.Pa.1996) (permitting removal of disguised rate challenge pursuant to artful pleading doctrine). Thus, plaintiffs' artful pleading further warrants this court's decision to exercise jurisdiction.

IV. COMPLETE PREEMPTION

Plaintiffs next argue that removal is proper on the basis of complete preemption. In considering this argument, the court must distinguish between ordinary conflict preemption and complete preemption. As the Fourth Circuit has explained:

> Under ordinary conflict preemption, state laws that conflict with federal laws are preempted, and preemption is asserted as 'a federal defense to the plaintiff's suit. As a defense it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court.' *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987). . . . In the case of complete preemption, however, Congress 'so completely pre-empt[s] a particular area that any civil complaint raising this select group of claims is necessarily federal in character.' *Taylor*, 481 U.S. at 63-64. That is to say, the doctrine of complete preemption 'converts an ordinary state common

> law complaint into one stating a federal claim.' *Id.* at 65. Thus, the doctrine of complete preemption serves as a corollary to the well-pleaded complaint rule: because the state claims in the complaint are converted into federal claims, the federal claims appear on the face of the complaint. *Id.* at 63-65.

Darcangelo v. Verizon Communications, __ F.3d __, WL 1058857, *2 (4th Cir. 2002); *see also Rosciszewski*, 1 F.3d at 231; *Marcus v. AT&T Corp.*, 138 F.3d 46, 52-53 (2d Cir. 1998). In such cases, removal is appropriate under the doctrine of complete preemption.

The complete preemption doctrine has been invoked by the Supreme Court in only three contexts since its inception: claims under the Labor Management Relations Act (LMRA), 29 U.S.C. § 141, *et. seq.*, between a labor union and employer under a collective bargaining agreement, *see Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 561-62 (1968); certain claims under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et. seq.*, *see Metropolitan Life*, 481 U.S. at 65-67; and claims regarding certain Indian land grant rights, *see Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-67 (1974). In 1993, the Fourth Circuit concluded that § 301 of the Copyright Act, 17 U.S.C. § 301(a), also supported complete preemption. *Rosciszewski*, 1 F.3d at 232-33.

Due to its infrequent usage, the precise rules for finding complete preemption are unclear. "[T]he evolution of the doctrine . . . has been one of fits-and-starts and zig-zags and

has, not surprisingly, occasioned both confusion and disagreement among the federal circuit and district courts." *Schmeling v. Nordam*, 97 F.3d 1336, 1339 (10th Cir. 1996) (*quoting Burke v. Northwest Airlines, Inc.*, 819 F. Supp. 1352, 1356 (E.D. Mich.1993)). "The inclusion of the term 'preemption' within the doctrine's label, while not inaccurate, has enkindled a substantial amount of confusion between the complete preemption doctrine and the broader and more familiar doctrine of ordinary preemption." *BLAB T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc.*, 182 F.3d 851, 854 (11th Cir. 1999); *Johnson v. Baylor Univ.*, 214 F.3d 630, 632 (5th Cir. 2000). Complete preemption is not triggered merely because a defendant successfully raises a federal preemption defense. To support an argument for removal based on complete preemption, a defendant must show not only that the plaintiff's claim is preempted under principles of federal law, but also that Congress intended to allow him to litigate the equivalent of his state claim in a federal forum. *BLAB T.V.*, 182 F.3d at 857.

The complete preemption doctrine was first applied in *Avco Corp.*, 390 U.S. at 560-62, where the Supreme Court determined that an employer's attempt to have union employees enjoined from striking was a suit "arising under the 'laws of the United States' within the meaning of the removal statute," even though the suit was brought in state court and invoked principles of state contract law. Years later, in *Franchise Tax Board*, the Court characterized *Avco* in this manner:

> The necessary ground of decision was that the preemptive force of § 301 [of the LMRA] is so

> powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law.

Franchise Tax Bd., 463 U.S. at 23-24.

The *Franchise Tax Board* Court considered the propriety of removing a state court action filed by a state tax board to enforce levies against an ERISA trust fund. The Court concluded that ERISA preemption did not convert the agency's state claim into a federal one because, unlike § 301 of the LMRA and the plaintiff in *Avco*, ERISA "did not provide an alternative cause of action in favor of the states to enforce its rights." *Franchise Tax Bd.*, 463 U.S. at 26, 103 S.Ct. 2841. The Court also found it important that, "[u]nlike the contract rights at issue in *Avco*, the State's right to enforce its tax levies is not of central concern to [ERISA]." *Id.* at 25-26.

In *Metropolitan Life*, however, the Supreme Court determined that a state court action that was both preempted by and within the scope of § 502(a) of ERISA would be

completely preempted under the *Avco* rule.[21] 481 U.S. at 64-67. The Court came to this conclusion, although reluctantly, for two reasons. First, the jurisdictional grant of § 502(a) was virtually identical to that of the LMRA, which the court had previously found indicative of complete preemption. *Id.* at 65-66. Second, the legislative history of ERISA revealed a clear Congressional intent that suits to enforce benefits under ERISA plans be treated as "arising under the laws of the United States in similar fashion to those brought under section 301 of the [LMRA] of 1947." *Id.* (*quoting* H.R. Conf. Rep. No. 93- 1280, p. 327 (1974)). These factors, taken together, demonstrated Congress's intent to make causes of action within the scope of § 502(a) removable to federal court. *Id.*

Avco, Franchise Tax Board, and *Metropolitan Life* suggest several factors that should be considered in determining whether removal is appropriate based on the doctrine of complete preemption. These include:

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21. Section 502(a)(1)(B) of ERISA provides:

A civil action may be brought-

(1) by a participant or beneficiary-

* * *

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan or to clarify his rights to future benefits under the terms of the plan.

> whether the state claim is displaced by federal law under an ordinary preemption analysis, whether the federal statute provides a cause of action, what kind of jurisdictional language exists in the federal statute, and what kind of language is present in the legislative history to evince Congress's intentions.

BLAB T.V., 182 F.3d at 857. In evaluating these factors, a court must keep in mind that the "touchstone" of the inquiry is not the "obviousness" of the preemption defense, but the intent of Congress. *Metropolitan Life*, 481 U.S. at 66, 107 S.Ct. 1542; *Rosciszewski*, 1 F.3d at 231-32.

Defendants articulate two statutory provisions which they believe support complete preemption: 47 U.S.C. § 332(c)(3), and 47 U.S.C. § 332(c)(7)(B)(iv).

47 U.S.C. § 332(c)(3)(A) provides:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(c)(7)(B)(iv) provides:

> No State or local government or instrumentality thereof may regulate the placement, construction,

> and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

Several appellate and district courts already have determined that the provisions of the FCA do not serve as a basis for removal pursuant to the complete preemption doctrine. *Smith v. GTE Corp.*, 236 F.3d 1292, 1312-13 (11th Cir. 2001) (the FCA does not provide a basis for removal pursuant to the complete preemption doctrine); *Marcus*, 138 F.3d at 53 (same); *Quayle v. MCI WorldCom, Inc.*, 2001 WL 1329594, **1-3, 2001 U.S. Dist. LEXIS 17450, *5-10 (N.D.Cal. Oct. 22, 2001) (unpubl.) (same); *Braco v. MCI Worldcom Communications, Inc.*, 138 F. Supp.2d 1260, 1268-69 (C.D.Cal.2001) (same); *Crump v. WorldCom, Inc.*, 128 F. Supp.2d 549, 556-60 (W.D.Tenn.2001) (the comprehensive nature of the regulatory scheme created by the FCA does not support complete preemption).

According to defendants, these holdings are of dubious relevance to the present case because they address the propriety of complete preemption in the context of wire-line rather than wireless communications, the latter area being where Congress has expressed a strong national interest in uniformity across state boundaries. Although this distinction could be considered significant, a number of courts have declined to invoke complete preemption in the area of wireless communications as well. *See Shaw v. AT & T Wireless Services, Inc.*, 2001 WL 539650, **1-4, 2001 U.S. Dist. LEXIS 6589, *4-14 (N.D.Tex. May 18, 2001) (unpubl.)

(§ 332(c)(3) does not support complete preemption); *Bell Atlantic Mobile, Inc. v. Zoning Board of Butler Township*, 138 F. Supp.2d 668, 676-77 (W.D.Pa.2001) (§ 332(c)(7) does not support complete preemption); *State of Iowa v. United States Cellular Corp.*, 2000 U.S. Dist. LEXIS 21656, at *15-16 (S.D.Iowa 2000) (unpubl.) (§ 332 does not support complete preemption); *Bryceland v. AT & T Corp.*, 122 F.Supp.2d 703, 706-10 (N.D.Tex.2000) (same); *Aronson v. Sprint Spectrum, L.P.*, 90 F. Supp.2d 662, 664-69 (W.D.Pa.2000) (same); *Sanderson, Thompson, Ratledge & Zimny v. AWACS, Inc.*, 958 F. Supp. 947, 952-58 (D.Del.1997) (same); *but see Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 986-90 (7th Cir. 2000) (§ 332(c)(3)(A) supports complete preemption). These courts have done so primarily because of the absence of indicia that Congress intended any of the provisions of the FCA, including the preemptive provisions of § 332, to permit removal.[22]

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22. Another factor federal courts consider in determining whether complete preemption is properly invoked is whether the plaintiff's state claim falls within the civil enforcement provisions of the federal statute. *Franchise Tax Bd.*, 463 U.S. at 24-26; *Aronson*, 90 F. Supp.2d at 665-67. To this end, defendants invoke 47 U.S.C. § 207 as the FCA provision that provides an enforcement mechanism:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

(Cont'd)

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(Cont'd)

47 U.S.C. § 207. A related provision, 47 U.S.C. § 206, declares a common carrier liable for damages for violations of the FCA.

To support complete preemption, a statute must create a cause of action that vindicates the same interest as that which the plaintiff's state claim seeks to enforce. *Aronson*, 90 F. Supp.2d at 666 (*citing Railway Labor Exec.*, 858 F.2d at 942). Defendants proffer 47 U.S.C. § 201 as the federal provision affording plaintiffs the substantive rights they seek. Section 201(b) provides, in pertinent part: "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful." 47 U.S.C. § 201(b). Defendants argue that the claim they have negligently and fraudulently provided unsafe products to the public constitutes a type of "unreasonable practice" prohibited by § 201, for which there is a damages remedy under § 207. Defendants concede, however, that the question of whether "practices" may be so broadly construed is one of first impression before this court.

Sections 207 and 206 are most often used with sections 201 or 203 to challenge unreasonable and discriminatory charges by telephone companies for long distance and/or wireless service. *See, e.g., Marcus*, 138 F.3d at 54 n. 1; *Shaw*, 2001 WL 539650, *3, 2001 U.S. Dist. LEXIS 6589, *11; *Minnesota v. Worldcom, Inc.*, 125 F. Supp.2d 365, 369-70 (D. Minn. 2000); *Bryceland*, 122 F. Supp.2d at 707-09; *cf. Aronson*, 90 F. Supp.2d at 666-67 (§ 207 provides a cause of action for plaintiffs challenging a service provider's practice of disclosing customer information in violation of 47 U.S.C. § 222). In contrast, §§ 201 and 207 have been held not to provide a cause of action for customers alleging claims of false advertisement, common law fraud, or deceptive business practices by commercial carriers. *Marcus*, 138 F.3d at 54; *Minnesota v. Worldcom*, 125 F. Supp.2d at

(Cont'd)

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Defendants argue that plaintiffs' claims are completely preempted by § 332 because plaintiffs, by asking state courts to enjoin the provision of cell phones without headsets on the basis of RF emissions, are essentially inviting state courts to regulate entry on the basis of radio frequency concerns, which §§ 332(c)(3)(A) and 332(c)(7)(B)(iv) expressly prohibit. Plaintiffs, on the other hand, contend that a state tort headset requirement is not a condition of entry as contemplated by § 332(c)(3), nor is a portable phone a "facility" for purposes of § 332(c)(7). The court does not need to reach these questions because, while §§ 332(c)(3) and (c)(7)(B)(iv) undoubtedly are strong express preemption provisions which may be held in state court to bar relief of the sort plaintiffs request,[23] neither provision demonstrates

(Cont'd)

372; *Bauchelle v. AT & T Corp.*, 989 F.Supp. 636, 645-46 (D.N.J.1997). Thus, to determine whether the FCA provides a cause of action against these defendants for plaintiffs' claims, the court would have to determine whether plaintiffs' products liability claims more closely resemble those for which the FCA provides a cause of action than those for which it does not. The court does not need to resolve this question, however, because even if §§ 201 and 207 provide a cause of action encompassing plaintiffs' claims, the FCA does not evidence Congressional intent to permit removal.

23. Indeed, state courts faced with suits of this nature before the enactment of the 1996 amendments found such claims preempted by other provisions of federal law. *Cf. Schiffner v. Motorola, Inc.*, 297 Ill.App.3d 1099, 232 Ill.Dec. 126, 697 N.E.2d 868, 874 (1998) (holding, *pre*-FTA, that claims that cell phones were unreasonably safe because of RF emissions were preempted by § 360kk(a)(1) of the Electronic Product Radiation Control Act); *Verb v. Motorola, Inc.*, 284 Ill.App.3d 460, 220 Ill.Dec. 275, 672 N.E.2d 1287, 1293 (1996) (same).

removal intent. *Bryceland*, 122 F. Supp.2d at 710; *Aronson*, 90 F. Supp.2d at 667-68; *Bauchelle*, 989 F. Supp. at 646- 48. To the contrary, and unlike the ERISA and the LMRA, the FCA contains a savings clause which provides, "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414. "The existence of this type of 'savings' clause which 'contemplate[s] the application of state-law and the exercise of state court jurisdiction to some degree . . . counsels against a conclusion that the purpose behind the . . . Act was to replicate the unique preemptive force of the LMRA and ERISA.'" *Smith*, 236 F.3d at 1313 (*quoting BLAB*, 182 F.3d at 857-58); *Marcus*, 138 F.3d at 54; *Bryceland*, 122 F. Supp.2d at 710; *Aronson*, 90 F. Supp.2d at 668; *Bauchelle*, 989 F. Supp. at 648; *Weinberg*, 165 F.R.D. at 441; *see also Geier v. American Honda Motor Company, Inc.*, 529 U.S. 861, 868 (2000) ("[A] savings clause assumes that there are some significant number of common-law liability cases to save."). Moreover, there is nothing in the legislative history or jurisdictional provisions of the FCA to suggest that Congress intended claims preempted by § 332 to "arise under" federal law in the same way as § 502 of ERISA or § 301 of the LMRA. Indeed, although § 332(c)(3) manifests a clear Congressional intent to act preemptively with regard to rates and market entry, the provision, by its own terms, is "narrowly conceived." *Bryceland*, 122 F.Supp.2d at 707 n. 3. By allowing states to regulate "other terms and conditions of commercial mobile services," the language of the provision itself suggests that Congress did not intend for it to support complete preemption. *Id.*

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Defendants suggest that a clear indication of removal intent is not required in the Fourth Circuit under *Rosciszewski v. Arete*, 1 F.3d 225. In *Rosciszewski*, the Fourth Circuit extended the complete preemption doctrine to § 301 of the Copyright Act, 17 U.S.C. § 301. *Rosciszewski*, 1 F.3d at 228. The plaintiff in *Rosciszewski* brought an action in state court against alleged appropriators of his copyrighted computer program on the grounds that their conduct violated a Virginia statute prohibiting copying by use of computer. *Id.* The defendants removed to federal court, and the court found the plaintiff's claims completely preempted by § 301. *Id.*

Nothing in *Rosciszewski*, however, is inconsistent with the notion that complete preemption requires removal intent. Indeed, after acknowledging that the doctrine has been sparingly and reluctantly applied, *Rosciszewski*, 1 F.3d at 231, the Fourth Circuit found the requisite intent for two reasons. *Id.* at 231-33. First, the court observed that the legislative history of § 301 indicates that the provision was "'intended to be stated in the clearest and most unequivocal language possible so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively.'" *Id.* (*quoting* H.R. Rep. No. 1476, 94th Cong.2d Sess. 1390 (1976)). Moreover, the court emphasized that Congress granted exclusive jurisdiction over copyright matters to federal courts, while permitting concurrent jurisdiction over claims under ERISA and the LMRA. *Id.* In the view of the Fourth Circuit, this jurisdictional grant is "strong evidence that Congress intended copyright litigation to take place in federal courts." *Id.* at 232. Such evidence "compels the conclusion that Congress intended that state-

law actions preempted by § 301(a) of the Copyright Act arise under federal law." *Id.*

Although the *Rosciszewski* court looked for and found removal intent, certain aspects of the Copyright Act precluded evaluating Congress's removal intent based on the specific factors found important by the Supreme Court in *Metropolitan Life*. When § 301 of the Copyright Act was enacted, for example, claims within the exclusive jurisdiction of federal courts could not be removed because of the derivative jurisdiction rule. *Rosciszewski*, 1 F.3d at 233, n. 6 (citations omitted). Since a claim under the Copyright Act would therefore have had to be brought in federal court directly (because federal courts had exclusive jurisdiction over such claims), questions about whether such claims could be removed were of no import. After Congress abolished the derivative jurisdiction rule in 1987, *id.*, federal courts were able to hear claims removed from state court even if the state court did not itself have jurisdiction. *Id.* (*citing* 28 U.S.C.A. § 1441(e) (West Supp.1993)). Because the question of removal was inapplicable at the time of the statute's enactment, however, the fact that removal was not mentioned in the legislative history could not be determinative of Congressional intent. *Id.* (citations omitted). Moreover, because the Copyright Act's exclusive jurisdiction provision was adopted before the Supreme Court's application of the complete preemption doctrine in *Avco* and *Metropolitan Life*, the court declined to "draw a negative inference from the failure of Congress" to make copyright matters removable with the same language used in the jurisdiction provisions of ERISA and the LMRA. *Id.*; *cf. Metropolitan Life*, 481 U.S. at 65-66 (relying on statement in ERISA's legislative

history that actions for benefits under ERISA plans are to be regarded as arising under federal law in the same manner as actions under § 301 of the LMRA).

The unique factors present in *Rosciszewski* are not present here. The FCA was amended in 1993 and 1996. During both of these time periods, Congress knew of the Supreme Court's interpretations of sections 301 of the LMRA and 502(a) of ERISA in *Avco* and *Metropolitan Life*, and could have expressly indicated removal intent if it desired to do so. Nothing in the legislative history or jurisdictional language of the FCA amendments expresses removal intent. The only court to have held otherwise is the Seventh Circuit in *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983 (7th Cir. 2000). In *Bastien*, the plaintiff sued AT & T in state court, alleging breach of contract and consumer fraud because he was experiencing a high number of dropped calls. The Seventh Circuit not only determined that Bastien's claims constituted state regulation of entry conditions in violation of § 332(c)(3), but also found § 332(c)(3) sufficient to support removal of the plaintiff's claim under the complete preemption doctrine. *Id.* at 987. The Seventh Circuit did not, however, engage in the analysis used by either the Supreme Court or the Fourth Circuit, as it did not look for removal intent in either the jurisdictional language or legislative history. Accordingly, this court cannot rely on *Bastien* as persuasive authority. The defendants have not established the requisite factors for complete preemption, and this court does not have jurisdiction over plaintiffs' claims by virtue of the complete preemption doctrine.

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V. FEDERAL OFFICER PROVISION

Finally, defendants argue that removal is proper under 28 U.S.C. § 1442(a)(1), which provides that an action may be removed by "[a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color of such office." In order to satisfy this provision, the defendants must (1) raise a colorable federal defense to the claims asserted against them; (2) show that they were acting under the direction of a federal officer; and (3) demonstrate a causal nexus between plaintiffs' claims and acts they performed under color of federal authority. *Pack v. AC & S, Inc.*, 838 F. Supp. 1099, 1101 (D.Md.1993) (*citing Mesa v. California*, 489 U.S. 121, 124-25 (1989)). Plaintiffs argue that defendants have failed to meet the last two requirements. The court agrees.

Most courts have held that in order for a defendant to be "acting under" a federal officer, the federal officer must have " 'direct and detailed control' over the defendant." *Fung v. Abex Corp.*, 816 F. Supp. 569, 572 (N.D.Cal.1992) (*citing Ryan v. Dow Chemical Co.*, 781 F. Supp. 934, 947 (E.D.N.Y. 1992)). "This control requirement can be satisfied by strong government intervention and the threat that a defendant will be sued in state court 'based upon actions taken pursuant to federal direction.'" *Id.* (*quoting Gulati v. Zuckerman*, 723 F.Supp. 353 (E.D.Pa.1989)). In *Ryan*, the court explained:

> The rule established is that removal by a "person acting under" a federal officer must be predicated upon a showing that the acts that form the basis for the state civil or criminal suit were performed

> pursuant to an officer's direct orders or to comprehensive and detailed regulations.... By contrast, a person or corporation establishing only that the relevant acts occurred under the general auspices of a federal office or officer is not entitled to section 1442(a)(1) removal. Likewise, the mere fact that a corporation participates in a regulated industry is insufficient to support removal absent a showing that the particular conduct being sued upon is closely linked to detailed and specific regulations.

781 F. Supp. at 947 (citation omitted).

Defendants argue that removal under § 1442(a)(1) is proper because "(1) the claims in these actions are directed at the design and configuration of wireless phones, and (2) the FCC specifically directed defendants to sell or provide only telephones emitting approved levels of RF." (Def. Opp. to PJ. Mot. for Remand, p. 63.) Defendants have not shown, however, that they were "acting under" federal officials with respect to the specific acts for which they are being sued. Plaintiffs' suit is based on defendants' failure to provide headsets with wireless phones. Thus, to support removal defendants must show not only that the phones were built according to FCC specifications, but also that the FCC restricted or prohibited them from providing additional safeguards, such as headsets, to consumers. *See Ruffin v. Armco Steel Corp.*, 959 F. Supp. 770, 774 (S.D.Tex.1997), *opinion vacated by Ruffin v. Armco Steel Corp.*, 1999 WL 318023 (S.D. Tex. 1999) (because case transferred to Judicial Panel on Multidistrict Litigation); *Arness v. Boeing North*

American, Inc., 997 F.Supp. 1268, 1275 (C.D.Cal.1998). Defendants have failed to show this.[24] Accordingly, removal based on the federal officer provision is improper.

A separate order follows.

Catherine C. Blake
United States District Judgde

Date

24. Indeed, as defendants concede elsewhere in their pleadings, the federal government has given them the option of providing headsets. (Def. Opp., p. 37 n. 16).

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MDL No. 1421

Civil Action No. 01-MD-1421

IN RE WIRELESS TELEPHONE RADIO FREQUENCY EMISSIONS PRODUCTS LIABILITY LITIGATION

THIS DOCUMENT RELATES TO:

Pinney, et al. v. *Nokia, et al.* (D.Md.)
Farina v. Nokia, et al. (E.D.Pa.)
Gilliam, et. al. v. Nokia, Inc., et. al. (S.D.N.Y.)
Gimpelson v. Nokia, Inc., et. al. (N.D.Ga.)
Naquin, et. al. v. Nokia, Inc., et al. (E.D.La.)

ORDER

For the reasons stated in the accompanying Memorandum, it is hereby Ordered that:

1. the plaintiffs' consolidated and renewed motion for remand is DENIED; and

2. copies of this Order and the accompanying Memorandum shall be sent to counsel of record.

_____
Catherine C. Blake
United States District Judge

_____
Date

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 12, 2005

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 03-1433
CA-01-3899-CCB
CA-01-3261-CCB
CA-01-3260-CCB
CA-01-3259-CCB
CA-01-1456-CCB
CA-01-1421-CCB

J. DOUGLAS PINNEY, M.D.; PATRICIA S. COLONELL, individually and on behalf of all others similarly situated; FRANCIS J. FARINA, individually and on behalf of all those similarly situated; GARRETT J. NAQUIN; RONALD LEBLANC; JUDITH A. KAUFMAN; ASHER RUBENSTEIN; CRYSTALL GILLIAM; DIMITRI MACK; RIEDY GIMPELSON, individually and on behalf of all others similarly situated; SARAH DAHLGREN, on behalf of herself and all others similarly situated; LINDA BARRELL; BLAYNE MINOGUE; BRIAN LANE BARRETT; DIANA BARRETT; DAVID C. KELLER; MARSHA L. KELLER,

Plaintiffs - Appellants,

v.

NOKIA, INCORPORATED, a/k/a Nokia Mobile Phones, Incorporated, a/k/a Nokia Corporation; NEC AMERICA, INCORPORATED; ERICSSON WIRELESS COMMUNICATIONS, INCORPORATED, a/k/a

Ericsson, Incorporated; Sprint PCS Limited Partnership, a/k/a Sprint PCS, a/k/a Sprint Spectrum, LLP, a/k/a Sprint Spectrum; Audiovox Communications Corporation; Nextel Communications, Incorporated, a/k/a Nextel Communications of the Mid-Atlantic, Incorporated, a/k/a Nextel Partners, Incorporated, a/k/a Nextel; Matsushita Corporation of America, a/k/a Panasonic Corporation; Philips Electronics North America Corporation; Qualcomm Incorporated; Samsung Electronics America, Incorporated, a/k/a Samsung Electronics; Sanyo North America, Incorporated, a/k/a Sanyo Business Systems Corporation, a/k/a Sanyo North America Group; Sony Electronics, Incorporated; AT & T Corporation, a/k/a AT & T; Verizon Maryland, Incorporated, a/k/a Verizon, a/k/a Verizon Wireless, formerly known as Bell Atlantic Maryland, Incorporated; Verizon Communications, Incorporated, formerly known as Bell Atlantic Corporation; Verizon Wireless, a/k/a NYNEX, a/k/a Bell Atlantic NYNEX, a/k/a Bell Atlantic Mobile, Incorporated, a/k/a Bell Atlantic NYNEX Mobile; Cellco Partnership, d/b/a Verizon Wireless, formerly known as Bell Atlantic NYNEX Mobile, formerly known as Bell Atlantic Mobile; Cingular Wireless, LLC, formerly known as BellSouth Mobility, Incorporated, a/k/a Southwestern Bell Wireless, formerly known as Southwestern Bell Mobile Systems, Incorporated; Cingular Wireless, a/k/a Washington/Baltimore Cellular Limited Partnership; SBC Communications, Incorporated; Cellular One Group, a/k/a Cellular One; Voicestream Wireless Corporation; C.E.I., Incorporated, a/k/a Communications Electronics, a/k/a Communications Electronics, Incorporated; Baltimore Business Communications, Incorporated; Comcast/Metrophone; Radiofone; Powertel, Incorporated;

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POWERTEL PCS, INCORPORATED; POWERTEL/ATLANTA, INCORPORATED; MITSUBISHI WIRELESS COMMUNICATIONS, INCORPORATED; MOTOROLA, INCORPORATED, a Delaware corporation; CELLULAR TELECOMMUNICATIONS AND INTERNET ASSOCIATION, a District of Columbia corporation; CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION; TELECOMMUNICATIONS INDUSTRY ASSOCIATION, a/k/a TIA; NEXTEL PARTNERS OPERATING CORPORATION,

Defendants - Appellees,

and

WESTINGHOUSE COMMUNICATIONS; SOUTHERN TELECOM, INCORPORATED, a/k/a Southern Linc; JOHN DOES 1-100; LGIC CORPORATION; PANASONIC CORPORATION; SAMSUNG SDI COMPANY; SANYO CORPORATION; SONY CORPORATION; PLANET CELLULAR COMMUNICATIONS, INCORPORATED; VISITOR CELLULAR L.L.C.; BELL SOUTH MOBILITY; KYOCERA WIRELESS CORPORATION; MCI WORLDCOM COMMUNICATIONS, INCORPORATED; U.S. WEST WIRELESS, L.L.C., A Colorado corporation; U.S. WEST COMMUNICATIONS, INCORPORATED, a Colorado corporation; GTE MOBILNET OF SAN DIEGO, INCORPORATED, a Delaware corporation; GTE WIRELESS SAN DIEGO, LLC, a California Limited Liability; CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA, a California corporation; AB CELLULAR HOLDINGS, LLC, d/b/a LA Cellular, d/b/a Los Angeles Cellular Telephone Company,

Defendants.

Appendix D

On Petition for Rehearing and Rehearing En Banc

The Appellees' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Luttig, Judge Michael, and Judge Kiser.

For the Court

/s/ Patricia S. Connor
CLERK

APPENDIX E — ARTICLE VI OF THE CONSTITUTION OF THE UNITED STATES

Constitution of the United States

Article VI. Debts Validated—Supreme Law of Land—Oath of Office

[. . .]

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[. . .]

APPENDIX F — PUBLIC LAW 104-104 SECTION 704

UNITED STATES PUBLIC LAWS
104th Congress - Second Session
Convening January 3, 1996

PL 104-104 (S 652)
February 8, 1996
TELECOMMUNICATIONS ACT OF 1996

An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

[. . .]

SEC. 704. FACILITIES SITING; RADIO FREQUENCY EMISSION STANDARDS.

[. . .]

(b) RADIO FREQUENCY EMISSIONS.—Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

APPENDIX G — 47 U.S.C. § 152

United States Code
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication
Subchapter 1. General Provisions

§ 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A.

(b) Exceptions to Federal Communications Commission jurisdiction

Except as provided in *sections 223* through *227* of this title, inclusive, and *section 332* of this title, and subject to the provisions of *section 301* of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate

communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that *sections 201* to *205* of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

APPENDIX H — 47 U.S.C. § 301

United States Code
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication
Subchapter III. Special Provisions Relating to Radio
Part I. General Provisions

§ 301. License for radio communication or transmission of energy

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or

signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in *section 303(t)* of this title); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

APPENDIX I — 47 U.S.C. § 303

United States Code
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication
Subchapter III. Special Provisions Relating to Radio
Part I. General Provisions

§ 303. Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

Appendix I

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: *Provided, however*, That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(k) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

Appendix I

(I)(1) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to persons who are found to be qualified by the Commission and who otherwise are legally eligible for employment in the United States, except that such requirement relating to eligibility for employment in the United States shall not apply in the case of licenses issued by the Commission to (A) persons holding United States pilot certificates; or (B) persons holding foreign aircraft pilot certificates which are valid in the United States, if the foreign government involved has entered into a reciprocal agreement under which such foreign government does not impose any similar requirement relating to eligibility for employment upon citizens of the United States;

(2) Notwithstanding paragraph (1) of this subsection, an individual to whom a radio station is licensed under the provisions of this chapter may be issued an operator's license to operate that station.

(3) In addition to amateur operator licenses which the Commission may issue to aliens pursuant to paragraph (2) of this subsection, and notwithstanding *section 301* of this title and paragraph (1) of this subsection, the Commission may issue authorizations, under such conditions and terms as it may prescribe, to permit an alien licensed by his government as an amateur radio operator to operate his amateur radio station licensed by his government in the United States, its possessions, and the Commonwealth of Puerto Rico provided there is in effect a multilateral or bilateral agreement, to which the United States and the alien's

government are parties, for such operation on a reciprocal basis by United States amateur radio operators. Other provisions of this chapter and of subchapter II of chapter 5, and chapter 7, of Title 5 shall not be applicable to any request or application for or modification, suspension, or cancellation of any such authorization.

(m)(1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) has violated, or caused, aided, or abetted the violation of, any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

(1) false or deceptive signals or communications, or

(2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) has willfully or maliciously interfered with any other radio communications or signals; or

(F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

(2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed suspension, has been given to the operator licensee who may make written application to the Commission at any time within said fifteen days for a hearing upon such order. The notice to the operator licensee shall not be effective until actually received by him, and from that time he shall have fifteen days in which to mail the said application. In the event that physical conditions prevent mailing of the application at the expiration of the fifteen-day period, the application shall then be mailed as soon as possible thereafter, accompanied by a satisfactory explanation of the delay. Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of the hearing which shall be conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension.

(n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act, or which the Commission by rule has authorized to operate without a license under *section 307(e)(1)* of this title, or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.

(o) Have authority to designate call letters of all stations;

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this chapter;

(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation. The permittee or licensee, and the tower owner in any case in which the owner is not the permittee or licensee, shall maintain the painting and/or illumination of the tower as prescribed by the Commission pursuant to this section. In the event that the tower ceases to be licensed by the Commission for the transmission of radio energy, the owner of the tower shall maintain the prescribed painting and/or illumination of such

tower until it is dismantled, and the Commission may require the owner to dismantle and remove the tower when the Administrator of the Federal Aviation Agency determines that there is a reasonable possibility that it may constitute a menace to air navigation.

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

(s) Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public.

(t) Notwithstanding the provisions of *section 301(e)* of this title, have authority, in any case in which an aircraft registered in the United States is operated (pursuant to a lease, charter, or similar arrangement) by an aircraft operator who is subject to regulation by the government of a foreign nation, to enter into an agreement with such government under which the Commission shall recognize and accept any radio station licenses and radio operator licenses issued by such government with respect to such aircraft.

(u) Require that apparatus designed to receive television pictures broadcast simultaneously with sound be equipped with built-in decoder circuitry designed to display closed-captioned television transmissions when such apparatus is manufactured in the United States or imported for use in the United States, and its television picture screen is 13 inches or greater in size.

(v) Have exclusive jurisdiction to regulate the provision of direct-to-home satellite services. As used in this subsection, the term "direct-to-home satellite services" means the distribution or broadcasting of programming or services by satellite directly to the subscriber's premises without the use of ground receiving or distribution equipment, except at the subscriber's premises or in the uplink process to the satellite.

(w) Omitted.

(x) Require, in the case of an apparatus designed to receive television signals that are shipped in interstate commerce or manufactured in the United States and that have a picture screen 13 inches or greater in size (measured diagonally), that such apparatus be equipped with a feature designed to enable viewers to block display of all programs with a common rating, except as otherwise permitted by regulations pursuant to *section 330(c)(4)* of this title.

(y) Have authority to allocate electromagnetic spectrum so as to provide flexibility of use, if—

(1) such use is consistent with international agreements to which the United States is a party; and

(2) the Commission finds, after notice and an opportunity for public comment, that—

(A) such an allocation would be in the public interest;

(B) such use would not deter investment in communications services and systems, or technology development; and

(C) such use would not result in harmful interference among users.

APPENDIX J — 47 U.S.C. § 332

United States Code
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication
Subchapter III. Special Provisions Relating to Radio
Part I. General Provisions

§ 332. Mobile services

(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with *section 151* of this title, whether such actions will—

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

Appendix J

(b) Advisory coordinating committees

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of Title 5 or *section 1342 of Title 31.*

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II

of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of *section 201*, *202*, or *208* of this title, and may specify any other provision only if the Commission determines that—

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of *section 201* of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of

the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service

prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding *sections 152(b)* and *221(b)* of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any

reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [*47 U.S.C.A. § 741* et seq.] of the corporation authorized by title III of such Act [*47 U.S.C.A. § 731* et seq.].

Appendix J

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of *section 310(b)* of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of *section 310(b)* of this title.

Appendix J

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in

writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph—

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in *section 303(v)* of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to such services.

(d) Definitions

For purposes of this section—

(1) the term "commercial mobile service" means any mobile service (as defined in *section 153* of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible

users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section; and

(3) the term "private mobile service" means any mobile service (as defined in *section 153* of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

APPENDIX K — 47 U.S.C. § 414

United States Code
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication
Subchapter IV. Procedural and Administrative Provisions

§ 414. Exclusiveness of chapter

Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

APPENDIX L — 21 U.S.C. § 360ii

United States Code
Title 21. Food and Drugs
Chapter 9. Federal Food, Drug, and Cosmetic Act
Drugs and Devices
Electronic Product Radiation Control

§ 360ii. Program of control

(a) Establishment

The Secretary shall establish and carry out an electronic product radiation control program designed to protect the public health and safety from electronic product radiation. As a part of such program, he shall—

(1) pursuant to *section 360kk* of this title, develop and administer performance standards for electronic products;

(2) plan, conduct, coordinate, and support research, development, training, and operational activities to minimize the emissions of and the exposure of people to, unnecessary electronic product radiation;

(3) maintain liaison with and receive information from other Federal and State departments and agencies with related interests, professional organizations, industry, industry and labor associations, and other organizations on present and future potential electronic product radiation;

(4) study and evaluate emissions of, and conditions of exposure to, electronic product radiation and intense magnetic fields;

(5) develop, test, and evaluate the effectiveness of procedures and techniques for minimizing exposure to electronic product radiation; and

(6) consult and maintain liaison with the Secretary of Commerce, the Secretary of Defense, the Secretary of Labor, the Atomic Energy Commission, and other appropriate Federal departments and agencies on (A) techniques, equipment, and programs for testing and evaluating electronic product radiation, and (B) the development of performance standards pursuant to *section 360kk* of this title to control such radiation emissions.

(b) Powers of Secretary

In carrying out the purposes of subsection (a) of this section, the Secretary is authorized to—

(1) (A) collect and make available, th ugh publications and other appropriate means, the results of, and other information concerning, research and studies relating to the nature and extent of the hazards and control of electronic product radiation; and (B) make such recommendations relating to such hazards and control as he considers appropriate;

(2) make grants to public and private agencies, organizations, and institutions, and to individuals for the purposes stated in paragraphs (2), (4), and (5) of subsection (a) of this section;

(3) contract with public or private agencies, institutions, and organizations, and with individuals, without regard to *section 3324 of Title 31* and *section 5 of Title 41*; and

(4) procure (by negotiation or otherwise) electronic products for research and testing purposes, and sell or otherwise dispose of such products.

(c) Record keeping

(1) Each recipient of assistance under this part pursuant to grants or contracts entered into under other than competitive bidding procedures shall keep such records as the Secretary shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

(2) The Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, and records of the recipients that are pertinent to the grants or contracts entered into under this part under other than competitive bidding procedures.

APPENDIX M — 47 C.F.R. § 1.1307

CODE OF FEDERAL REGULATIONS
TITLE 47—TELECOMMUNICATION
CHAPTER I—FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A—GENERAL
PART 1—PRACTICE AND PROCEDURE
SUBPART I—PROCEDURES IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

§ 1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

(a) Commission actions with respect to the following types of facilities may significantly affect the environment and thus require the preparation of EAs by the applicant (see §§ 1.1308 and 1.1311) and may require further Commission environmental processing (see §§ 1.1314, 1.1315 and 1.1317):

(1) Facilities that are to be located in an officially designated wilderness area.

(2) Facilities that are to be located in an officially designated wildlife preserve.

(3) Facilities that:

(i) May affect listed threatened or endangered species or designated critical habitats; or

(ii) are likely to jeopardize the continued existence of any proposed endangered or threatened species or likely to result in the destruction or adverse modification of proposed critical habitats, as determined by the Secretary of the Interior pursuant to the Endangered Species Act of 1973.

Note: The list of endangered and threatened species is contained in *50 CFR 17.11*, *17.22*, 222.23(a) and 227.4. The list of designated critical habitats is contained in *50 CFR 17.95*, *17.96* and Part 226. To ascertain the status of proposed species and habitats, inquiries also may be directed to the Regional Director of the Fish and Wildlife Service, Department of the Interior.

(4) Facilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places. (See *16 U.S.C. 470w(5)*; 36 CFR part 60 and 800.) To ascertain whether a proposed action may affect properties that are listed or eligible for listing in the National Register of Historic Places, an applicant shall follow the procedures set forth in the rules of the Advisory Council on Historic Preservation, 36 CFR part 800, as modified and supplemented by the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, Appendix B to Part 1 of this Chapter, and the Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, Appendix C to Part 1 of this Chapter.

(5) Facilities that may affect Indian religious sites.

(6) Facilities to be located in a flood Plain (See Executive Order 11988.)

(7) Facilities whose construction will involve significant change in surface features (e.g., wetland fill, deforestation or water diversion). (In the case of wetlands on Federal property, see Executive Order 11990.)

(8) Antenna towers and/or supporting structures that are to be equipped with high intensity white lights which are to be located in residential neighborhoods, as defined by the applicable zoning law.

(b) In addition to the actions listed in paragraph (a) of this section, Commission actions granting construction permits, licenses to transmit or renewals thereof, equipment authorizations or modifications in existing facilities, require the preparation of an Environmental Assessment (EA) if the particular facility, operation or transmitter would cause human exposure to levels of radiofrequency radiation in excess of the limits in § 1.1310 and § 2.1093 of this chapter. Applications to the Commission for construction permits, licenses to transmit or renewals thereof, equipment authorizations or modifications in existing facilities must contain a statement confirming compliance with the limits unless the facility, operation, or transmitter is categorically excluded, as discussed below. Technical information showing the basis for this statement must be submitted to the Commission upon request. Such compliance statements may be omitted from license applications for transceivers subject to the certification requirement in § 25.129 of this chapter.

Appendix M

(1) The appropriate exposure limits in § 1.1310 and § 2.1093 of this chapter are generally applicable to all facilities, operations and transmitters regulated by the Commission. However, a determination of compliance with the exposure limits in § 1.1310 or § 2.1093 of this chapter (routine environmental evaluation), and preparation of an EA if the limits are exceeded, is necessary only for facilities, operations and transmitters that fall into the categories listed in table 1, or those specified in paragraph (b)(2) of this section. All other facilities, operations and transmitters are categorically excluded from making such studies or preparing an EA, except as indicated in paragraphs (c) and (d) of this section. For purposes of table 1, "building-mounted antennas" means antennas mounted in or on a building structure that is occupied as a workplace or residence. The term "power" in column 2 of table 1 refers to total operating power of the transmitting operation in question in terms of effective radiated power (ERP), equivalent isotropically radiated power (EIRP), or peak envelope power (PEP), as defined in § 2.1 of this chapter. For the case of the Cellular Radiotelephone Service, subpart H of part 22 of this chapter; the Personal Communications Service, part 24 of this chapter and the Specialized Mobile Radio Service, part 90 of this chapter, the phrase "total power of all channels" in column 2 of table 1 means the sum of the ERP or EIRP of all co-located simultaneously operating transmitters owned and operated by a single licensee. When applying the criteria of table 1, radiation in all directions should be considered. For the case of transmitting facilities using sectorized transmitting antennas, applicants and licensees should apply the criteria to all transmitting channels in a given sector, noting that for a highly directional antenna there is relatively little contribution to ERP or EIRP summation for other directions.

APPENDIX N — 47 C.F.R. § 2.803

CODE OF FEDERAL REGULATIONS
TITLE 47—TELECOMMUNICATION
CHAPTER I—FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A—GENERAL
PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS
SUBPART I—MARKETING OF RADIO-FREQUENCY DEVICES

§ 2.803 Marketing of radio frequency devices prior to equipment authorization.

(a) Except as provided elsewhere in this section, no person shall sell or lease, or offer for sale or lease (including advertising for sale or lease), or import, ship, or distribute for the purpose of selling or leasing or offering for sale or lease, any radio frequency device unless:

(1) In the case of a device subject to certification, such device has been authorized by the Commission in accordance with the rules in this chapter and is properly identified and labelled as required by § 2.925 and other relevant sections in this chapter; or

(2) In the case of a device that is not required to have a grant of equipment authorization issued by the Commission, but which must comply with the specified technical standards prior to use, such device also complies with all applicable administrative (including verification of the equipment or

authorization under a Declaration of Conformity, where required), technical, labelling and identification requirements specified in this chapter.

(b) The provisions of paragraph (a) of this section do not prohibit conditional sales contracts between manufacturers and wholesalers or retailers where delivery is contingent upon compliance with the applicable equipment authorization and technical requirements, nor do they prohibit agreements between such parties to produce new products, manufactured in accordance with designated specifications.

(c) Notwithstanding the provisions of paragraphs (a), (b), (d) and (f) of this section, a radio frequency device may be advertised or displayed, e.g., at a trade show or exhibition, prior to equipment authorization or, for devices not subject to the equipment authorization requirements, prior to a determination of compliance with the applicable technical requirements provided that the advertising contains, and the display is accompanied by, a conspicuous notice worded as follows:

This device has not been authorized as required by the rules of the Federal Communications Commission. This device is not, and may not be, offered for sale or lease, or sold or leased, until authorization is obtained.

(1) If the product being displayed is a prototype of a product that has been properly authorized and the prototype, itself, is not authorized due to differences between the prototype and the authorized product, the following disclaimer notice may be used in lieu of the notice stated in paragraph (c) introductory text of this section:

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Prototype. Not for sale.

(2) Except as provided elsewhere in this chapter, devices displayed under the provisions of paragraphs (c) introductory text, and (c)(1) of this section may not be activated or operated.

(d) Notwithstanding the provisions of paragraph (a) of this section, the offer for sale solely to business, commercial, industrial, scientific or medical users (but not an offer for sale to other parties or to end users located in a residential environment) of a radio frequency device that is in the conceptual, developmental, design or pre-production stage is permitted prior to equipment authorization or, for devices not subject to the equipment authorization requirements, prior to a determination of compliance with the applicable technical requirements provided that the prospective buyer is advised in writing at the time of the offer for sale that the equipment is subject to the FCC rules and that the equipment will comply with the appropriate rules before delivery to the buyer or to centers of distribution. If a product is marketed in compliance with the provisions of this paragraph, the product does not need to be labelled with the statement in paragraph (c) of this section.

(e)(1) Notwithstanding the provisions of paragraph (a) of this section, prior to equipment authorization or determination of compliance with the applicable technical requirements any radio frequency device may be operated, but not marketed, for the following purposes and under the following conditions:

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(i) Compliance testing;

(ii) Demonstrations at a trade show provided the notice contained in paragraph (c) of this section is displayed in a conspicuous location on, or immediately adjacent to, the device;

(iii) Demonstrations at an exhibition conducted at a business, commercial, industrial, scientific, or medical location, but excluding locations in a residential environment, provided the notice contained in paragraphs (c) or (d) of this section, as appropriate, is displayed in a conspicuous location on, or immediately adjacent to, the device;

(iv) Evaluation of product performance and determination of customer acceptability, provided such operation takes place at the manufacturer's facilities during developmental, design, or pre-production states; or

(v) Evaluation of product performance and determination of customer acceptability where customer acceptability of a radio frequency device cannot be determined at the manufacturer's facilities because of size or unique capability of the device, provided the device is operated at a business, commercial, industrial, scientific, or medical user's site, but not at a residential site, during the development, design or pre-production stages. A product operated under this provision shall be labelled, in a conspicuous location, with the notice in paragraph (c) of this section.

(2) For the purpose of paragraphs (e)(1)(iv) and (e)(1)(v) of this section, the term "manufacturer's facilities" includes the facilities of the party responsible for compliance with the regulations and the manufacturer's premises, as well as the facilities of other entities working under the authorization of the responsible party in connection with the development and manufacture, but not marketing, of the equipment.

(3) The provisions of paragraphs (e)(1)(i), (e)(1)(ii), (e)(1)(iii), (e)(1)(iv), and (e)(1)(v) of this section do not eliminate any requirements for station licenses for products that normally require a license to operate, as specified elsewhere in this chapter.

(i) Manufacturers should note that station licenses are not required for some products, e.g., products operating under part 15 of this chapter and certain products operating under part 95 of this chapter.

(ii) Instead of obtaining a special temporary authorization or an experimental license, a manufacturer may operate its product for demonstration or evaluation purposes under the authority of a local FCC licensed service provider. However, the licensee must grant permission to the manufacturer to operate in this manner. Further, the licensee continues to remain responsible for complying with all of the operating conditions and requirements associated with its license.

(4) Marketing, as used in this section, includes sale or lease, or offering for sale or lease, including advertising for sale or lease, or importation, shipment, or distribution for the purpose of selling or leasing or offering for sale or lease.

(5) Products operating under the provisions of this paragraph (e) shall not be recognized to have any vested or recognizable right to continued use of any frequency. Operation is subject to the conditions that no harmful interference is caused and that any interference received must be accepted. Operation shall be required to cease upon notification by a Commission representative that the device is causing harmful interference and shall not resume until the condition causing the harmful interference is corrected.

(f) For radio frequency devices subject to verification and sold solely to business, commercial, industrial, scientific, and medical users (excluding products sold to other parties or for operation in a residential environment), parties responsible for verification of the devices shall have the option of ensuring compliance with the applicable technical specifications of this chapter at each end user's location after installation, provided that the purchase or lease agreement includes a proviso that such a determination of compliance be made and is the responsibility of the party responsible for verification of the equipment. If the purchase or lease agreement contains this proviso and the responsible party has the product measured to ensure compliance at the end user's location, the product does not need to be labelled with the statement in paragraph (c) of this section.

(g) The provisions in paragraphs (b) through (f) of this section apply only to devices that are designed to comply with, and to the best of the responsible party's knowledge will, upon testing, comply with all applicable requirements in this chapter. The provisions in paragraphs (b) through (f) of this section do not apply to radio frequency devices that

could not be authorized or legally operated under the current rules. Such devices shall not be operated, advertised, displayed, offered for sale or lease, sold or leased, or otherwise marketed absent a license issued under part 5 of this chapter or a special temporary authorization issued by the Commission.

(h) The provisions in subpart K of this part continue to apply to imported radio frequency devices.

APPENDIX O — 47 C.F.R. § 2.1093

CODE OF FEDERAL REGULATIONS
TITLE 47—TELECOMMUNICATION
CHAPTER I—FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A—GENERAL
PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS
SUBPART J—EQUIPMENT AUTHORIZATION PROCEDURES
RADIOFREQUENCY RADIATION EXPOSURE

§ 2.1093 Radiofrequency radiation exposure evaluation: portable devices.

(a) Requirements of this section are a consequence of Commission responsibilities under the National Environmental Policy Act to evaluate the environmental significance of its actions. See subpart I of Part 1 of this chapter, in particular § 1.1307(b).

(b) For purposes of this section, a portable device is defined as a transmitting device designed to be used so that the radiating structure(s) of the device is/are within 20 centimeters of the body of the user.

(c) Portable devices that operate in the Cellular Radiotelephone Service, the Personal Communications Service (PCS), the Satellite Communications Services, the Wireless Communications Service, the Maritime Services, the Specialized Mobile Radio Service, the 3650 MHz

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Wireless Broadband Service, the 4.9 GHz Band Service, the Wireless Medical Telemetry Service (WMTS) and the Medical Implant Communications Service (MICS), authorized under subpart H of part 22 of this chapter, parts 24, 25, 27, 80 and 90 of this chapter, subparts H and I of part 95 of this chapter, and unlicensed personal communication service, unlicensed NII devices and millimeter wave devices authorized under subparts D and E, §§ 15.253, 15.255 and 15.257 of this chapter are subject to routine environmental evaluation for RF exposure prior to equipment authorization or use. All other portable transmitting devices are categorically excluded from routine environmental evaluation for RF exposure prior to equipment authorization or use, except as specified in §§ 1.1307(c) and 1.1307(d) of this chapter. Applications for equipment authorization of portable transmitting devices subject to routine environmental evaluation must contain a statement confirming compliance with the limits specified in paragraph (d) of this section as part of their application. Technical information showing the basis for this statement must be submitted to the Commission upon request.

(d) The limits to be used for evaluation are based generally on criteria published by the American National Standards Institute (ANSI) for localized specific absorption rate ("SAR") in Section 4.2 of "IEEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz," ANSI/IEEE C95.1-1992, Copyright 1992 by the Institute of Electrical and Electronics Engineers, Inc., New York, New York 10017. These criteria for SAR evaluation are similar to those recommended by the National Council on Radiation

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Protection and Measurements (NCRP) in "Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields," NCRP Report No. 86, Section 17.4.5. Copyright NCRP, 1986, Bethesda, Maryland 20814. SAR is a measure of the rate of energy absorption due to exposure to an RF transmitting source. SAR values have been related to threshold levels for potential biological hazards. The criteria to be used are specified in paragraphs (d)(1) and (d)(2) of this section and shall apply for portable devices transmitting in the frequency range from 100 kHz to 6 GHz. Portable devices that transmit at frequencies above 6 GHz are to be evaluated in terms of the MPE limits specified in § 1.1310 of this chapter. Measurements and calculations to demonstrate compliance with MPE field strength or power density limits for devices operating above 6 GHz should be made at a minimum distance of 5 cm from the radiating source.

(1) Limits for Occupational/Controlled exposure: 0.4 W/kg as averaged over the whole-body and spatial peak SAR not exceeding 8 W/kg as averaged over any 1 gram of tissue (defined as a tissue volume in the shape of a cube). Exceptions are the hands, wrists, feet and ankles where the spatial peak SAR shall not exceed 20 W/kg, as averaged over an 10 grams of tissue (defined as a tissue volume in the shape of a cube). Occupational/Controlled limits apply when persons are exposed as a consequence of their employment provided these persons are fully aware of and exercise control over their exposure. Awareness of exposure can be accomplished by use of warning labels or by specific training or education through appropriate means, such as an RF safety program in a work environment.

(2) Limits for General Population/Uncontrolled exposure: 0.08 W/kg as averaged over the whole-body and spatial peak SAR not exceeding 1.6 W/kg as averaged over any 1 gram of tissue (defined as a tissue volume in the shape of a cube). Exceptions are the hands, wrists, feet and ankles where the spatial peak SAR shall not exceed 4 W/kg, as averaged over any 10 grams of tissue (defined as a tissue volume in the shape of a cube). General Population/ Uncontrolled limits apply when the general public may be exposed, or when persons that are exposed as a consequence of their employment may not be fully aware of the potential for exposure or do not exercise control over their exposure. Warning labels placed on consumer devices such as cellular telephones will not be sufficient reason to allow these devices to be evaluated subject to limits for occupational/controlled exposure in paragraph (d)(1) of this section.

(3) Compliance with SAR limits can be demonstrated by either laboratory measurement techniques or by computational modeling. Methodologies and references for SAR evaluation are described in numerous technical publications including "IEEE Recommended Practice for the Measurement of Potentially Hazardous Electromagnetic Fields—RF and Microwave," IEEE C95.3-1991.

(4) For purposes of analyzing portable transmitting devices under the occupational/controlled criteria, the time-averaging provisions of the MPE guidelines identified in § 1.1310 of this chapter can be used in conjunction with typical maximum duty factors to determine maximum likely exposure levels.

(5) Time-averaging provisions of the MPE guidelines identified in § 1.1310 of this chapter may not be used in determining typical exposure levels for portable devices intended for use by consumers, such as hand-held cellular telephones, that are considered to operate in general population/uncontrolled environments as defined above. However, "source-based" time-averaging based on an inherent property or duty-cycle of a device is allowed. An example of this would be the determination of exposure from a device that uses digital technology such as a time-division multiple-access (TDMA) scheme for transmission of a signal. In general, maximum average power levels must be used to determine compliance.

APPENDIX P — 47 C.F.R. § 22.927

CODE OF FEDERAL REGULATIONS
TITLE 47—TELECOMMUNICATION
CHAPTER I—FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B—COMMON CARRIER SERVICES
PART 22—PUBLIC MOBILE SERVICES
SUBPART H—CELLULAR RADIOTELEPHONE SERVICE

§ 22.927 Responsibility for mobile stations.

Mobile stations that are subscribers in good standing to a cellular system, when receiving service from that cellular system, are considered to be operating under the authorization of that cellular system. Cellular system licensees are responsible for exercising effective operational control over mobile stations receiving service through their cellular systems. Mobile stations that are subscribers in good standing to a cellular system, while receiving service from a different cellular system, are considered to be operating under the authorization of such different system. The licensee of such different system is responsible, during such temporary period, for exercising effective operational control over such mobile stations as if they were subscribers to it.

APPENDIX Q — 47 C.F.R. § 24.51

CODE OF FEDERAL REGULATIONS
TITLE 47—TELECOMMUNICATION
CHAPTER I—FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B—COMMON CARRIER SERVICES
PART 24—PERSONAL COMMUNICATIONS SERVICES
SUBPART C—TECHNICAL STANDARDS

§ 24.51 Equipment authorization.

(a) Each transmitter utilized for operation under this part and each transmitter marketed, as set forth in § 2.803 of this chapter, must be of a type that has been authorized by the Commission under its certification procedure for use under this part.

(b) Any manufacturer of radio transmitting equipment to be used in these services may request equipment authorization following the procedures set forth in subpart J of part 2 of this chapter. Equipment authorization for an individual transmitter may be requested by an applicant for a station authorization by following the procedures set forth in part 2 of this chapter.

(c) Applicants for certification of transmitters that operate in these services must determine that the equipment complies with IEEE C95.1-1991, "IEEE Standards for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz" as measured using methods specified in IEEE C95.3-1991,

Appendix Q

"Recommended Practice for the Measurement of Potentially Hazardous Electromagnetic Fields—RF and Microwave." The applicant for certification is required to submit a statement affirming that the equipment complies with these standards as measured by an approved method and to maintain a record showing the basis for the statement of compliance with IEEE C.95.1-1991.

APPENDIX R — AMICUS PARTICIPATION BY THE FCC IN SUPPORT OF REHEARING AND REHEARING EN BANC DATED APRIL 11, 2005

U.S. Department of Justice
Office of the Solicitor General
Washington, D.C. 20530

April 11, 2005

Re: *Pinney* v. *Nokia, Inc.*, No. 03-1433 (4th Cir.)
(Luttig, *Michael*; *Kiser*, Sr. D.J. [dissenting])

AMICUS PARTICIPATION BY THE FCC IN SUPPORT OF REHEARING AND REHEARING EN BANC

s/ Paul D. Clement
PAUL D. CLEMENT
Acting Solicitor General

Court of appeals determination:

[ ] Appeal
[xx] Intervention or Amicus Part.
[ ] Rehearing en banc
[ ] Other

Supreme Court Determination:

[ ] Certiorari
[ ] Appeal
[ ] Amicus participation
[ ] Other

District court determination or
state court determination [ ]

APPENDIX S — FIRST SUPPLEMENTAL AND AMENDING CLASS ACTION COMPLAINT FILED APRIL 20, 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

~~CIVIL~~ ACTION

NO. 00-2023

SECION "B"

MAGISTRATE 4

GARRETT NAQUIN

VERSUS

NOKIA MOBILE PHONES, INC., WESTINGHOUSE CORPORATION, NEC AMERICA, INC., ERICSSON INC., MOTOROLA CORPORATION, SPRINT CORPORATION, AUDIOVOX CORPORATION, LGIC CORPORATION, NEXTEL COMMUNICATIONS, INC., PANASONIC CORPORATION, PHILIPS CORPORATION, QUALCOMM CORPORATION, SAMSUNG SDI CO., LTD. AND SAMSUNG ELECTRONICS, SANYO CORPORATION, SONY CORPORATION, AT&T CORPORATION, CELLULAR RENTALS, INC., PLANET CELLULAR COMMUNICATIONS, INC., VISITOR CELLULAR L.L.C., BELL SOUTH MOBILITY AND RADIOFONE

* * * * *

Appendix S

FIRST SUPPLEMENTAL AND AMENDING CLASS ACTION COMPLAINT

NOW INTO COURT, through counsel, comes plaintiff, who files this First Supplemental and Amending Class Action Complaint by which is added class representative named defendants and factual allegations and by which are added and deleted cause of action, all as set forth herein.

I.

All of the original allegations of the original petition filed in the Civil District Court for the Parish of Orleans, State of Louisiana, thereafter removed to this Court in this proceeding are restated and re-incorporated in their entirety unless and only to the extent they are specifically amended and/or supplemented by any of the allegations stated herein. All new paragraphs will be identified by Roman numerals.

II.

Paragraph 1 is supplemented to add the following parties:

Plaintiffs

a) Judith A. Kaufman is a person of the full age of majority and a citizen and resident of this state and this district.

b) Asher Rubinstein is a person of the full age of majority and a citizen and resident of this state and this district.

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Defendants

a) Philips Electronic North America Corporation (PENAC) is a Delaware corporation with its principal place of business in New York, but having a business establishment in Louisiana at 8550 United Plaza Blvd. with CT Corporation System at 8550 United Plaza Boulevard, Baton Rouge, Louisiana, as its agent for service of process.

b) By substituting "Motorola Inc." in the place and stead of Motorola Corp.

c) Audiovox Communications Corporation is a corporation incorporated in a state other than Louisiana with its principal place of business in a state other than Louisiana, but having a Louisiana office at 707 Rapides Street, Baton Rouge, and USC of Louisiana Inc. at 3867 Plaza Tower Drive, 1st Floor, Baton Rouge, Louisiana as its agent for service of process.

d) Sanyo Business Systems Corporation is a foreign corporation with its address at 1006 Hibernia Bank Building, New Orleans, Louisiana 70112 with its agent for service of process at Prentiss-Hall Corp. System, Inc., 203 Carondelet Street, New Orleans, LA 70130.

e) Nokia Corporation is a corporation incorporated in a state other than Louisiana with its principal place of business at 1290 Avenue of the Americas, New York, New York 10104.

f) Nokia, Inc. is a corporation incorporated outside of Louisiana with its principle place of business outside of the State of Louisiana.

g) Cingular Wireless, LLC, formerly BellSouth Mobility, Inc., is a corporation with its principal place of business in Delaware, but having a business establishment in Louisiana at 320 Somerulos Street, Baton Rouge, LA 70802-6129 with its agent for service of process at Corporation Service Company, 320 Somerulos Street, Baton Rouge, LA 70802-6129.

h) Sprint Spectrum LLP, d/b/a Sprint PCR is a corporation with its principal place of business in Delaware, but having a business establishment in Louisiana at 203 Carondelet Street, Suite 811, New Orleans, LA 70130-3017 with its agent for service of process at The Prentice-Hall Corporation System, Inc., 701 South Peters Street, Second Floor, New Orleans, LA 70130.

i) Kyocera Wireless Corporation as successor in interest to Qualcomm, is a foreign corporation with its principal place of business in California, but having a business establishment in Louisiana

at 320 Somerulos Street, Baton Rouge, LA 70802-6129 with its agent for service of process at Corporation Service Company, 320 Somerulos Street, Baton Rouge, LA 70802-6129.

INTRODUCTORY ALLEGATIONS

III.

This is a civil action filed as a class action arising out of the manufacture and sale of cellular wireless hand held telephones (hereinafter referred to "WHHPs") which WHHPs failed to include as a standard component thereof headsets, i.e. the device or mechanism necessary to protect the users from radio frequency radiation (RFR) emitted from WHHPs' antennas placed in close proximity to the user's head. The WHHPs at issue herein are not to be confused with cellular telephones and other communication devices permanently mounted in automobiles, trucks, and other public and/or private vehicles. These are wireless cellular telephones currently in widespread use in the United States and the world which are held up to the user's car and against the user's head, thereby exposing individuals to unwanted RFR and in the absence of headsets, which are not a standard component of WHHPs, fail to protect users from and exposure to RFR which creates health risks and adverse effects by causing nerve damage, cellular damage, cellular dysfunction and/or other injury to humans.

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IV.

By amending the original Petition so as to substitute the words "wireless hand held portable telephones" (WHHPs) in the place and stead of the words "cell phones" wherever the words "cell phones" and/or "cellular phones" were used in the original Petition.

V.

Scientific and medical research, published in peer reviewed literature, has demonstrated adverse cellular reaction and cellular dysfunction from exposure to RFR from cell phone frequencies and other frequencies within radio frequency band of 300 megahertz to 2.4 gigahertz.

VI.

The adverse effects are broken down into the following areas:

a) calcium and ion distributions;

b) melatonin production;

c) neurological effects;

d) DNA single and double strand breaks and chromosome damage;

e) enzyme activities;

Appendix S

f) cell stress and gene transcription; and

g) interference with function of the blood brain barrier.

VII.

The Chemical Link: Calcium and Ion Distribution across the Membrane

The universal chemical link between EMFs and life processes is believed by many scientists to be ions, especially calcium ions. External EMFs clearly affect the electrical properties and ion distribution around cells. Virtually all physiological processes in our body involve ions.

VIII.

One of the most experienced researchers in the field, Dr. Ross Adey, in 1988 presented a three step model involving calcium ions which could explain observed EMF induced biological effects. Key to the model is the activation of intracellular messenger systems (adenylate across and protein kinase) by calcium in a stimulus amplification process across the cell membrane.

IX.

Numerous scientific studies have demonstrated the physiological importance of calcium. Calcium functions as an ubiquitous intracellular messenger. For example, in 1947 it was shown that an intracellular injection of a small amount of calcium causes a skeletal muscle to contract. In recent

years it has become clear that calcium acts as an intracellular messenger in a wide variety of cellular responses, including secretion and cell proliferation. In nerve cells, calcium influx had been shown to be involved in the initiation of neurotransmitter secretion; the calcium enters the cells through voltage-gated ion channels that open when the plasma membrane of the nerve terminal is depolarized by an invading action potential. Another function of calcium in all cells is to regulate metabolic processes in conjunction with the calcium-binding protein calmodulin. Many enzymatic processes are regulated by calcium. Calcium has been shown to modify gene transcription.

X.

Thus, induced alteration of intracellular calcium concentrations which disrupts the homeostasis of the cell, has serious consequences for the health and future development of the cell. Calcium ions in partnerships with biomolecules have been shown to control the proliferation of non turmorigenic cells in vitro and in vivo. The evidence points to calcium and a biomolecule called AMP being co-generators of the signal committing the cell to DNA syntheses. Calcium influx in a cell stimulates proliferation, whereas calcium efflux does the opposite.

XI.

Balcer-Kubiczel (1994) linked intracellular calcium levels to the future of damaged cells between becoming transformed (cancer) or dying by apoptosis (the health situation). Mattana et al. (1977) described the importance of

calcium ions for cell homeostasis which controls a variety of cellular responses determining the health of the cell. Hence, reductions in intracellular calcium have a very important effect.

XII.

Calcium ions are involved in the function of gap junctions or protein structures which link adjacent cells and provide a channel for the passing of messenger molecules. The gap junction can open and close to control the flow. The opening and closing is regulated by calcium ion concentration. Thus, calcium plays another key role in maintaining or interrupting the communication mechanisms for maintaining the health of cells because gap junctions are used to sense differences between cells and to initiate corrections in regulatory behavior as necessary.

XIII.

It is widely accepted that calcium plays a central role in the development of the immune system response. An elevation of calcium ions is a nearly universal feature associated with activation of cells of the immune system. Using T-cell human leukemia cells, Lindstrom et al. (1995) replicated and extended the research of other scientists and showed, that oscillating low level EMPs produce the same calcium ion reaction as does an, antibody.

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XIV.

Numerous scientific studies have demonstrated that EMFs can alter the membrane ion pumps responsible for pumping calcium, sodium and potassium in and out of the cells, effects have been shown at low current densities, thousands of times lower than currents induced by MW fields. ELF fields have been shown to have the same effect. ELF fields have been shown to have the same effect. Reference is made to a scientific paper from, 1992 mentioning 10 different laboratories which have demonstrated these effects of calcium.

XV.

Dr. Cherry of Lincoln University, New Zealand concludes: There is extremely strong evidence that both ELF and ELF modulated RF/MW radiation causes calcium ion efflux from cells which significantly alter the intracellular calcium concentrations, reducing the efficacy of lymphocytes in the immune system, participating in the alteration of transformation of pineal serotonin to melatonin and altering the damaged cells likelihood of becoming neoplastic (cancerous) or dying by apoptosis.

XVI.

Radio Frequency Radiation: Effect on Melatonin Production

Many scientific studies have linked cellular EMF-induced calcium-effects to the extremely important hormone

melatonin which is produced in the pea-sized endocrine organ called the pineal gland, located near the center of the brain.

XVII.

Dr. Cherry writes "the calcium ion mediated responses to neurotransmitters on the membrane of the pineal cells have been discussed by Wilson et al. (1989) in relation to ELF induced melatonin reduction. Thus it is highly probable that pinealocytes exposed to modulated RF/MW will experience an outflow of calcium ions, a reduction of the CAMP signal transduction activity and a reduction in the production of melatonin. This is a highly plausible mechanism to explain why RF/MW can reduce pineal melatonin production with consequent adverse health effects."

XVIII.

Melatonin is produced at night and released into the blood stream to be dispersed throughout the body. Once in the blood stream, melatonin has access to every cell in the body. It passes through the cell membranes where every nucleus has receptors for it.

XIX.

Melatonin is believed to have at least six fundamental physiological functions; mediating the whole-body 24 hour circadian rhythm; regulating sleep, mood and behavior like depression, anger and rage; scavenging free radicals (highly reactive cancer promoting agents); reduce secretion

of tumor-promoting hormones; regulating gene expressions; protecting and stimulating the immune system.

XX.

Dr. Neil Cherry writes "Because of its action in removing free radicals, melatonin is probably the most efficient natural cell protection and oncostatic agent in our bodies. Every night, our pineal gland produces large quantities of melatonin which flood almost every cell in our body, cleaning out the free radicals and assisting cell division to take place with undamaged DNA. Since damaged DNA can undergo mutation, it may result in the growth of a tumor. As we age, our nocturnal peak melatonin production falls markedly, making elderly people much more prone to cancer.

XXI.

Numerous studies have shown that free radicals have an important role in the aging process. Aging has been ascribed to accumulated oxidative damage to body tissues and involvement of free radicals in neurodegenerative diseases, such as Alzheimer's, Huntington's and Parkinson's has also been suggested.

XXII.

Melatonin reduction in cells and animals has been found by several laboratories. There is direct evidence of reduction in melatonin secretion in humans exposed to EMF, the effect varying from person to person, and that the timing of the exposures is also a factor. In one of the latest reports on

melatonin (1998), Dr. Burch et al. found reductions in the nocturnal secretion of a urinary melatonin metabolite among electric utility workers.

XXIII.

Consequence of Low Melatonin: DNA Breaks and Chromosome Damage

Dr. Lai and co-workers at University of Washington, Seattle have worked extensively on the induction of DNA damage in rat brain cells and tissue. This research has shown that ELF as well as RF/MW exposures cause a significant increase in the amount of DNA breakage in rat brain cells. This research has been confirmed by other researchers.

XXIV.

Dr. Lai writes: most cells have a considerable ability to repair DNA strand breaks; however, some cells only have a limited ability to handle this, such as brain and nerve cells which therefore could accumulate DNA breaks. Cumulative DNA breaks may affect cell function and may be the cause of slow onset diseases such as cancer. One of the popular hypothesis for cancer development is that DNA damaging agents induce mutations in DNA leading to expression of certain genes and suppression of other genes resulting in uncontrolled cell growth. Thus, damage to cellular DNA or lack of its repair could be an initial event in developing a tumor. However, when too much DNA damage is accumulated over time, the cell will die. Cumulative damage in DNA in cells also has been shown during aging.

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Particularly, cumulative DNA damage in nerve cells of the brain has been associated with neurodegeneration diseases, such as Alzheimer's, Huntington's and Parkinson's diseases.

XXV.

Dr. Lai reported that the EMF induced DNA breaks could be blocked by treating the rats with melatonin.

XXVI.

Dr. Cherry has summarized a number of studies associating EMT exposures with chromosomal damage. The Wireless Technology Research (WTR), an industry support research group, reported that cellular phone radiation can triple the number of chromosomal abnormalities in human blood (Microwave News, March-April 1999). The chairman of WTR, Dr. George Carlo told Microwave News that "WTR had found links between cellular phone use and cancer."

XXVII.

Neurological Effects

One of the most repeated effects of ELF modulated RF/MW is the calcium ion efflux from brain cells. This may lead to altered release and binding of neurohormones and neurotransmitters.

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XXVIII.

Dr. Adey (1981) reported "there is unequivocal experimental evidence that fields from ELF to UHF (IOHz to 450 MHz) interact directly with brain tissue." In 1991, Dr. Adey stated "RF fields that are sinusoidally amplitude modulated at ELF frequencies produce a wide range of biological interactions. Induced electric gradients can be substantially higher than those produced by simple ELF electric fields, and at levels of 10-100 mV/cm, are at the same range as intrinsic oscillations generated biologically, such as the electroencephalogram (EEG)."

XXIX.

A recent summary of research relating to neurological effects of EMF exposure reports: changes in circadian rhythm (weber 1974); changes in evoked potential induced by MW exposure, decreasing latency and amplitude of reflex responses (Taylor and Schleman 1975); significant and repeatable changes in the behavior of advanced mammals (cats and monkeys) induced by oscillating EMFs; changes in the dopamine (neurotransmitter) and opiate systems of the brain induced by EMFs (Frey 1990); changes in the functioning of the endogenous opioids; EEG changes in animals have been shown in numerous studies on rabbits, rats, mice, etc.; EEG and sleep changes in humans exposed to GSM cell phone-like signals at a power density of 0.001mW/cm^2 of or SAR of 0.001W/Kg (von Klitziag 1995, Mann and Roschke 1996); learning and memory impairment; stress induction, stress hormone induction and reception;

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acetylcholine, corticotrophin, benzodiazepine; Change in brain potential in humans induced by MW EMFs (Freude 1998).

XXX.

The research team at the Catholic University of America (CUA) in Washington, DC, headed by Professor Theodore Litovitz has worked for more than a decade on the effects of EMF on the activity of the important enzyme omithine decarboxylase (QDC) in different cell lines, human and animal, and in chicken embryos. ODC is involved in DNA replication, i.e., cell growth. Increased ODC activity has for many years been used as a marker for cancer. ODC is very active in fetal development.

XXXI.

The CUA team has consistently found EMF-induced change in the activity of ODC, and corresponding EMF-induced increase in the rate of fetal abnormalities in developing chicken embryos.

XXXII.

Dr. Martin of University of Western Ontario, Canada, has found EMF-induced changes in the activity of another important enzyme, nucleotidase (5'-NT), in developing chicken embryos and hatched chickens.

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XXXIII.

On February 13, 1998, an international team of collaborating scientists representing five research institutions; Hughes Institute, St. Paul, Minnesota; University of Minnesota, Minneapolis; University of California, Riverside, Yale University, New Haven, Connecticut; and Kansai Medical University, Moriguehi, Japan, published the results of two new studies, funded by NIH, showing that 60 Mz EMFs trigger a cascade of enzyme-driven cell-signaling events that could result in cancer. The EMFs activated a tyrostine kinase enzyme dangling from the inner surface of the cell membrane. The EMFs triggered also a second tyrosine kinase known as BTK. Studies in people have shown that excessive activation of BTK can lead to leukemia, lymphomas and other cancers.

XXXIV.

Cell Stress and Gene Transcription

In 1987, Dr. Henry Lai, University of Washington, Seattle, speculated that biological responses are in effect stress responses, i.e., EMF is a stressor. Dr. Lai and his team carried out a series of experiments to compare the effects of MW EMF on acetylcholine with those of two known stressors; loud noise and body restraint.

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XXXV.

The studies showed that the responses are very similar. The two other pieces of information also supported the notion that EMF is a stressor. It turned out that EMF activates the stress hormone corticotrophin releasing factor, and affect benzodiazepine receptors in the brain. Benzodiazepine receptors mediate the action of antianxiety drugs, such *as* valium and librium, and are known to change when an animal is stressed.

XXXVI.

Dr. Reba Goodman of Columbia University, New York, has studied altered patterns of biosynthesis induced by EMFs. Dr Goodman and her team (1989) observed the synthesis of low molecular weight proteins called heat shock or stress proteins following exposure to EMFs. These stress proteins are also formed as a result of other stressors such as heat shock, ionizing radiation, infections, chemical toxins, etc.

XXXVII.

In later studies Dr. Goodman showed that EMFs alter the expression and transcription of genes responsible for the onset of stress protein production. Dr. Goodman's work has been confirmed later by other scientists (O. Smith 1996).

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XXXVIII.

In 1998 a team of scientists at the Department of Life Sciences, University of Nottingham, UK, published a study showing that transgenic nematodes, used to monitor toxic contaminants in water and soil, react to MW ENE as a stressor, thus confirming the results of Dr. Goodman.

XXXIX.

Dr. Goodman has published other reports of studies showing that EMFs alter the transcription of proto-oncogenes (c-myc and others), which gene factors are believed to be associated with, the onset of cancer.

XL.

On information and belief the defendants made knowing misrepresentations and engaged in a conspiracy to deprive the public of information and, in so doing, provided a product without necessary safety features in the forms of headsets to isolate and insulate the user from RFR, which RFR and its impact are non-apparent upon inspection of the WHHP. The misrepresentation and conspiracy is evidenced, but is by no means limited to the following events:

XLI.

The Defendants knew or should have known that the use of RFR frequency in WHHPs was hazardous and also that it was foreseeable that WHHPs created some health risk and would or could cause some adverse health effect.

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XLII.

The Defendants' researchers and engineers have known at all times relevant that RFR energy is absorbed and/or penetrates deeply into biological tissue such as the human head and brain, and that RFR can have a serious biological impact on the WHHP user. The Defendants failed to inform their customers and the general public through warning, mailings, advertisements, or any other means, that RFR can cause undesired biological changes, harm and/or create health risks.

XLIII.

Plaintiffs, customers of the Defendants, and the general public were and continue to be misled and deceived by the Defendants into believing that these WHHPs operate at power levels too low to cause adverse health effects and/or are, in the absence of headsets, completely safe for public use.

XLIV.

Defendants were in control of the design, assembly, manufacture, packaging, marketing and/or sales of WHHPs and related services, which have been widely advertised by the Defendants as safe.

XLV.

In late 1994, researchers reported on their observation that rats exposed to microwaves similar in intensity to those radiating from a WHHPs antenna appeared to experience

single strand DNA breakage as a result of the exposure. The following year, reports were published suggesting double strand DNA breaks in the same exposure scenario. Researchers had adapted the traditionally *in vitro* single cell gel assay in an *in vivo* situation. From this, Defendants knew or should have known that WHHPs had the capability to cause biological damage.

XLVI.

In 1997, researchers were reporting biological effects in rats exposed head first to WHHP mediated RFR. These studies represented controlled studies showing biological effects from RFR exposure that were not heat induced.

XLVII.

Defendants who are members of what was formerly known as the Cellular Telecommunications Industry Association, (CTIA), but now known as the Cellular Telecommunication and Internet Association and/or the Telecommunications Industry Association (TIA) have, through the use of and with the CTIA, and/or (TIA) knowingly, negligently and otherwise wrongfully continued to maintain as an industry that WHHPs are safe in the absence of headsets even though the studies proved that such representations were unwarranted.

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XLVIII.

The Plaintiffs allege that the Defendants intentionally, negligently and wrongfully reported that the WHHPs were safe and that there was no danger and/or risk of danger from levels of RFR emitted from WHHPs.

XLIX.

Even though Defendants were aware of the increasing demand for WHHPs and wireless service, on information and relief and as suggested by events described herein, they, individually and/or through industry organization, failed to conduct adequate testing, manipulated the results of other testing, concealed evidence that WHHP radiation is harmful, and suppressed scientific and medical research.

L.

The Defendants were aware of the results of numerous studies outlining the biological risks associated with WHHPs. Nevertheless, the Defendants failed to apprize claimants, their other customers, and the public that WHHPs pose biological risks.

LI.

Research conducted and paid for directly by one or more of the Defendants has repeatedly shown that the Defendants have and continue to manipulate science to the detriment of consumers by failing to reveal all relevant findings and by

selectively withholding important public health information from the public and claimants.

LII.

The Defendants have actively encouraged the increased use of WHHPs, while knowing the biological risks associated with their use.

LIII.

The product warnings in effect during the period relevant to this Complaint were both substantively and graphically wholly inadequate to alert claimants and other consumers of the risks and/or potential risks associated with WHHP use in the absence of a headset.

LIV.

As a result, the public has been grossly misled and misinformed regarding the biological risks and effects and/or potential biological risks associated with WHHP usage in the absence of a headset.

LV.

At all times relevant, Defendants, themselves, or by use of others, did manufacture, create, design, test, label, package, distribute, supply, market, sell, advertise, and/or otherwise distribute WHHPs, products, and services related to WHHPs through the United States, as well as to WHHP owners and

users throughout its service areas and, as to some Defendants, internationally.

LVI.

Defendants' strategy has been to aggressively market and sell these products and the related services while, at the same time, misleading and misinforming potential users about the products and by failing to protect users from health risks, effects, and dangers which Defendants knew or should have known could result from use of WHHPs without a headset.

LVII.

Defendants undertook an advertising blitz extolling the virtues of WHHPs in order to induce widespread use of the product. The Defendants marketing campaign consisted of advertisements on television, radio, and the Internet, promotional literature to be placed in the printed media and in other advertising media, and other promotional materials to be provided to potential users of WHHPs.

LVIII.

Defendants purposefully downplayed, understated, and/or did not state the health hazards, effects, and/or the potential health risks associated with WHHPs. Defendants, through promotional literature, deceived potential users of WHHPs by relaying positive information, including testimonials from satisfied users, and by manipulating statistics to suggest widespread acceptability, while downplaying, understating, and/or misstating the known and/or potential adverse and

serious health effects. Defendants kept relevant information from potential and actual WHHP users and minimized user concern regarding the safety of these products and services.

LIX.

In the materials produced and disseminated by Defendants, they misrepresented a number of facts regarding WHHPs, including the following:

a. The presence of adequate testing of RFR and potential biological effects on WHHP users.

b. The adverse health effects that may be caused by WHHPs.

LX.

During World War II intensive research and engineering work led to the development of devices capable of producing electromagnetic energy at the radio frequency band.

LXI.

Defendants were aware or should have been aware of numerous studies and experiments that demonstrated the health hazards of radiation from RFR dating back to the 1940s.

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LXII.

The medical and scientific communities were well aware of the biological effects of RFR in the 1920's. In 1928, Helen Hosner, a researcher at the Albany Medical College, showed that radio waves were capable of heating body tissue in a study investigating the effects of experimental short wave radio transmitters on workers at a General Electric research facility. Her work was entitled "Heating Effects Observed in a High Frequency Static Field" published in Science.

LXIII.

In a 1948 article published in the archives of Physical Medicine, it was reported that electromagnetic radiation at 2,450 MHz was "highly productive in producing lenticular opacities."

LXIV.

In 1952 researchers noted that "experiments in which the head area alone was directly irradiated suggests that the fatal outcome was the result of an excessive rise in brain temperature. The lethal effects of irradiation to a limited area of the body are different from those in which the entire animal is exposed." That warning was published after researchers had exposed laboratory rats to a few seconds of intense exposure of radio frequency radiation. The warning was published in Microwave Radiation; Biophysical Considerations and Standards Criteria, IEEE Transactions on Biomedical Engineering.

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LXV.

In 1955, researchers Schwan and Piersol published their work that radio frequency energy, in a broad range from 500 MHz to 1000 MHz is preferentially deposited beyond the skull and absorbed into the brain.

LXVI.

In its initial form, during the 1960's the IEEE/ANSI safety standard, known as ANSIC95.1, established a maximum safe exposure level for radio frequency radiation at 10.0mW/cm2. The modified standard. ANSIC95.1-1982 set the maximum level for radio frequency exposure on a sliding scale by dividing the frequency by a multiple of three hundred. At 845 MHz, the safety standard would be 2.8mW/cm2; at 1900 MHz, the safety standard would be 6.33mW/cm2.

LXVII.

In 1962, it was known in the scientific community that radio frequency energy is most efficiently absorbed into human tissue and is capable of producing undesirable effects.

LXVIII.

It was well known in the scientific and medical communities in the 1970s that an antenna is the most efficient means of depositing energy into the human body and penetrating human tissue.

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LXIX.

In 1971, A.W. Guy published in IEEE Transaction in Microwave Theory and Techniques that in order to obtain selective heating, "hot spot" heating, it is necessary to expose the tissue to the near zone fields of the energy source, namely the antenna. From this experimental data at 433 MHz, 750 MHz, and 918 MHz the research confirmed that energy is readily absorbed from the induction fields in the near zone. The absorption within the brain was found to be about 20 times greater than that of the skull and subcutaneous fat.

LXX.

In 1972, in a study by I.J. Bahl, it was demonstrated that frequencies between 700 megahertz and 1000 megahertz interact most efficiently with human tissue to yield the greatest energy absorption and that the temporal lobe of the brain is the most sensitive area of the body to this type of radiation. The work performed by Bahl was published in IEEE Transactions on Microwave Theory and Techniques, a publication accepted as authoritative in the medical and scientific communities.

LXXI.

In 1977, L.C. Lin published the results of his research in IEEE Transaction on Microwave Theory and Techniques. Results revealed that because microwave absorption occurs in a very short time there is little chance for heat conduction to take place; the conduction of heat takes much longer. At "hot spots" the inability of biological tissue to get rid of

excess heat quickly and efficiently may be yet another mechanism leading to destructive exposure.

LXXII.

Research confirmed that "hot spot" absorption is dependent on the diameter of the head model which was used. As the diameter decreased the absorption effect became more pronounced. Most notably. The greatest absorption enhancement occurs at frequencies between 800 MHz to 1000 MHz, effectively covering the portable cellular telephone transmit band.

LXXIII.

In 1977, O.P. Gandhi published a study in Radio Science which confirmed that radiation absorption enhancement occurs when subjects are close to reflecting surfaces. Gandhi reported a measured energy absorption enhancement factor of as much as 27 in close proximity to corner shaped reflectors and about 4.7 for flat reflectors.

LXXIV.

In 1978, MOTOROLA studied the efficiency of the antenna and learned that the maximum Specific Absorption Rate exists at the antenna "feed point."

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LXXV.

Long before the introduction of cellular telephones, researchers provided data indicating that children absorb approximately 50% more radiation within their heads than do adults. The research performed by C.H. Durney, reported in IEEE Transactions on Microwave Theory and Techniques in 1979, only took into consideration the plain wave, far field exposures and did not include any of the enhancement effects that are introduced by the near zone operation of cellular telephones.

LXXVI.

In 1979, researchers Sheppard, Bawin and Adey confirmed in a published article that low intensity modulated (16 Hz) 450 MHz fields produced modified calcium efflux through brain cell membranes. The researchers observed the effect for power density levels lower than 2.0mW/cm2. The work was published in Radio Science in December 1979.

LXXVII.

In 1979, in an experiment by J.L. Meyerhoff, laboratory rats were killed quickly to prevent unwanted changes in brain structure. It was reported that "it is preferable to focus the microwave energy into the head of the animal, thereby increasing the efficiency of the energy delivered to the brain." The experiment was published in IEEE Transactions on Microwave Theory and Techniques in January 1980.

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LXXVIII.

The cellular phone industry conducted extensive research in the early 1980s on the effects of antennas and discovered that there is a large amount of stored energy that is disposed immediately around the antenna of a cell phone.

LXXIX.

In follow up research, Adey published in 1980 research demonstrating modifications in brain cells at low level radiation exposure. Adey also reported that weak modulation frequency radiation results in major physiological changes. The work was published in Proceedings of the IEEE, January 1980.

LXXX.

In 1981, a MOTOROLA researcher was quoted in IEEE Transactions on Vehicular Technology (November) "the proposed standard recognizes the possibility of encountering fields higher than the maxima of the protection guides in the close vicinity of low power radiators, like portable communication equipment. For this reason, an exclusion clause for devices operating at 1GHz or less and with less than 7 watts output power has been proposed."

LXXXI.

At the same time, MOTOROLA researchers publically stated, "the Radio Frequency Protection Guides of the American National Standards Institute at 750 MHz would

be violated at 0.3 centimeters distance by resident dipole radiating about 1mW and at .5 centimeters distance by a radiated power of 4mw." "A resident dipole provides the most favorable condition of minimum stored energy around the antenna." The researchers conceded that, "a rigorous enforcement without exclusion of the radio frequency protection guides would render portable radios practically useless."

LXXXII.

MOTOROLA researchers concealed from the public the enhancement effects of antennas and the efficiency that antennas deposit energy into brain tissue. In an article published in 1981 in IEEE Transactions on Vehicular Technology, a prominent MOTOROLA employee stated, "this paper addresses the question of how long the power radiated by a dipole has to be so that the field near the antenna never exceeds the ANSI – Proposed Protection Guides for distances greater than .3 centimeters, which is the spacing which at times separate the antenna from the head of the portable radio user. Radiated power of a few milliwatts is enough to exceed the proposed radiation protection guides at 750 MHz. Such reticence in accepting the clause probably resides in the fact that the near field of antennas is largely univestigated." At the same time, a prominent Motorola researcher stated, "the study of the near field has been substantially neglected." The same prominent MOTOROLA researcher stated, "dipole antennas, although extensively used in portable and mobile communications, have not been carefully investigated in the near field."

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LXXXIII.

In 1981, during the time that the exclusion of the portable cellular phones was debated within the ANSI Committee, a MOTOROLA researcher was quoted as stating, "strict enforcement . . . technically forbids the exposure to resident dipole about 19 centimeters long, radiating 1Mw."

LXXXIV.

In 1982, MOTOROLA researchers found that as little as 250 micro watts radiated power would be enough to exceed the safety standards established by the American National Standards Institute when using the helix antenna as the radiator for near zone exposure. The study was published in IEEE Transaction on Vehicular Technology in November, 1982.

LXXXV.

The MOTOROLA researchers found that the exposure to the helical antennas yields a power density of as much as 127mW/cm2 when the antenna is placed about 1 centimeter distant. The radiated power was only .02 Watts, which is thirty times less than what is radiated from a portable cellular phone.

LXXXVI.

MOTOROLA's deceptive misrepresentations led customers and the public into believing that ther were health care standards in place, when in fact MOTOROLA knew the

following: (1) that human body absorbs non-ionizing electromagnetic energy; (2) that more radiation is absorbed by the users' hand and head than is transmitted into space; and (3) that the absorbed radiation by the users, hand and head exceeded acceptable safe standards.

LXXXVII.

The Defendants knew since the 1970's that this type of radiation is absorbed by the human body and not reflected away. Overwhelming research by notable scientist has indicated that more than 50% of the radiated energy from cell phones is absorbed within the head and brain.

LXXXVIII.

In 1984, in an article published by Microwave News, there was a report of a 1984 study by the United States Air Force in which it was found by Dr. Vernot of the University of California "findings of excess malignancies in the exposed animals is provocative" after being exposed to radio frequency radiation.

LXXXIX.

In 1986, the United States Air Force sponsored a study performed by A.W.Guy in which 100 rats were irradiated over a three year period and compared to 100 rats that were not exposed to radiation but were otherwise treated identically. After the experiments were completed the researchers reported that 18 malignant tumors developed in the exposed rats as compared to 5 in the control group rats.

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The researchers claimed that such a difference was "statistically highly significant." They also stated, "at face value this last finding suggests that low levels of microwave radiation can cause cancer in mice." Remarkably, the Environmental Protection Agency accepted a report by the same researchers who suddenly "corrected" their conclusions. The EPA in 1986 stated that evidence of carcinogenicity must be confirmed to specific tumor type.

XC.

In 1989, Stephen Cleary presented a review of the state of research related to non-thermal interactions and effects of radio frequency radiation. He concluded, "cellular studies provide convincing evidence that PF radiation, and other types of electric or magnetic fields, can alter living systems via direct non-thermal mechanisms, as well as via heating."

XCI.

During a 1989 meeting of the ANSI Committee, held in Tucson, Arizona, industry representatives dominated the membership of the standard setting committee. After a heated discussion and debate over the exclusion clause it was decided upon a vote by the committee that portable cellular telephones would not be excluded from regulation or compliance under the ANSI Safety Standards. A short time after the meeting, at another quietly held committee meeting attended by a select, smaller group of members, the exclusion clause passed, and as a result, cell phones would be excluded from any testing, compliance, or monitoring by any safety standard, government agency or regulatory body.

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XCII.

The American National Standards Institute 'ANSI' has adopted a set of electromagnetic energy exposure levels that the Institute of Electrical and Electronic Engineers (IEEE) has determined to be safe for humans. The ANSI safety standard was initially developed during the 1960's modified during the early 1980's, and modified again, most recently, during the early 1990's.

XCIII.

The cellular phone industry manipulated the research and pressured members of the Safety Standard Committee to exempt portable cellular telephones from regulation and compliance under the ANSI standards. Cellular telephones, then and now, would not meet the ANSI standard established in 1982.

XCIV.

In 1992, a project performed by A. Macs confirmed a marked increase in the frequency of chromosomal aberrations and the presence of micro nuclei in peripheral blood after exposed to 2,450 MHz radiation.

XCV.

In 1992, F. Montecchia published an article in IEEE transaction in Biomedical Engineering that some antennas are specifically designed to use the non radiating induction energy (around the antenna) for penetration into humans.

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Once such antenna was specifically developed to provide an improved method for depositing energy into tissue for hyperthermia treatment.

XCVI.

In 1992, it was reported in Microwave News, a news publication widely circulated and read by the scientific and medical community, that Keith Angstadt, an antenna technician, was treated at Johns Hopkins University for exposure to radio frequency radiation which led to his loss of night vision and color blindness. The retinas of his eyes had sustained 5mW/cm2 of continuous wave radiation.

XCVII.

The medical and scientific communities were all aware of the extensive research published and reported throughout the 1950's and 1960's of the dangers of causing burns when RFR is applied over a bony prominence. It was revealed that non-uniformities such as bone ridges and irregular fat layers caused the energy to be absorbed non-uniformiy within the body or head.

XCVIII.

On January 26, 1993, MOTOROLA, through one of its senior executives announced to the news media, and subsequently reported by the news media to the public, that "thousands of studies" had already shown cellular phones were safe. Such statement was fraudulent, deceitful, and misleading.

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XCIX.

On July 16, 1993, the Cellular Telecommunications Industry Association (CTIA) representing many of the named Defendants, issues a report entitled "Safety Update-Fast Facts; Portable Cell Phone Safety" in which it was deceptively stated, in bold print, the following: "Rest assured; cellular telephones are safe!"

C.

On July 19, 1993, Elizabeth Jacobson, Deputy Director of Sciences at the Center for Devices and Radiological Health, Food and Drug Administration, sent a correspondence to CTIA president Thomas Wheeler, which clearly identified certain deceitful statements made by the Defendants to the public regarding the "safety" of WHHPs. In pertinent part, this letter states:

> I am writing to let you know that we were concerned about two Important aspects of your press conference on July 16 concerning the safety of cellular phones, and to ask that you carefully consider the following comments when you make future statements to the press.
>
> First, both the written press statements and your verbal comments during the conference seemed to display an unwarranted confidence that these products will be found to be absolutely safe. In fact, the unremittingly upbeat tone of the press packet strongly implies that there can be no hazard,

> leading the reader to wonder why any further research would be needed at all. (Some readers might also wonder how impartial the research can be when its stated goal is 'a determination to reassure consumers,' and when the research Sponsors predict in advance that 'we expect the new research to reach the same conclusion, that the cellular phones are safe.'
>
> We are even more concerned that your press statements did not accurately characterize the relation between CTIA and the FDA. . . . [S]ince it is not yet clear whether we will help to direct the research program, it is premature to state that we will credential the research.

To sum up, Mr. Wheeler our role as a public health agency is to protect health and safety, not to "reassure consumers". I think it is very important that the public understand where we stand in evaluating the possibility that cellular phones might pose a risk. . . .

CI.

In 1993, N. Kuster published an article in IEEE Transactions on Biomedical Engineering which demonstrated the high level of energy absorbed into the head and brain in the area close to the location of the antenna. Kuster reported that the maximum SAR measured in models of human heads exposed to 1 Watt of energy was 5mW/g. The antenna employed was approximately one inch from the head of the model.

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CII.

In December 1993, Chegrinets reported that pulsed 150 to 300 MHz at 5mW/cm2 caused chromosomal changes in human peripheral lymphocytes and whole blood cells.

CIII.

In or about late 1993/early 1994, the cell phone industry, including certain of the named Defendants, through CTIA, organized a committee which was to draft a manual to discuss "responsible" WHHP use. After receiving a draft of the manual, Thomas Wheeler, president of CTIA, sent out a memorandum expressing his concerns over language used in the manual which acknowledged and/or implied that the use of WHHPs could pose health risks. An example of such substantive changes follows, with the suggested deletions put forth in bold typeface:

> Do not operate your transportable cellular telephone when holding the antenna, or when any person is within 4 inches (10 centimeters) of the antenna. **Otherwise you may impair call quality, may well cause your phone to operate at a higher power level than is necessary, and may expose that person to RF energy in excess of the Levels established by the updated ANSI Standard.**

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If you want to limit RF exposure even further, you may choose to control the duration of your calls or maintain a distances from the antenna of more than 4 inches (10 centimeters).

For best call quality, keep the antenna free from obstructions and point it straight up."

CIV.

Gandhi, a well known and respected researcher, published findings of his research that were contradictory to Kusters, Gandhi reported that the maximum SARs within the human brain would be about 30 times lower than what Kuster had reported. But by March of 1994, the word in the research community had spread that the Gandhi team had, in fact, misstated SAR figures. During the 1994 Bioelectomagnetics Society 16th Annual Conference, Gandhi produced findings of still higher maximum SARs for the same research. During his presentation, SARs corresponded, at times, to levels as much as ten times higher than were previously reported. The conference results, presented in Copenhagen, Denmark, never reached the U.S. audience. In a letter to the Federal Communications Commission, August 1994, Gandhi explained the nature of the errors and revised his experimental results upward. That is, nearly a full year after the initial false claim of safety and almost six months after his revisions first became known, Gandhi team provided an official correction.

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CV.

In 1994 research performed in India by Sarkar, et al. confirmed that DNA modifications result from low-level exposure to radio frequency radiation. Clearly, if radio frequency radiation can rearrange the DNA in tissue then it can initiate cancer.

CVI.

In 1994, Henry Kues, a Johns Hopkins researcher, reported cell destruction and cell death comparable to that which would be expected from ultraviolet radiation was reported from exposure of rhesus monkeys to 1,250, 2,450 and 2,850 MHz radio frequency radiation. In a 1980 addition of IEEE Proceedings, it was reported that radio frequency radiation may inactivate enzymes or proteins that are involved in the repair process to correct DNA breaks and may also be responsible for inhibiting inherent DNA repair processes. In 1984, two researchers, Dr. Chang and Dr. Milham, made a presentation to the Annual Bioelectromagnetics Society Conference in which they revealed an increase in malignant tumors in rats after long term exposure to radio frequency radiation in experiments they conducted.

CVII.

In 1994, L. Verschaeve documented evidence that human and rat blood samples exposed to 450 and 954 MHz radiation provided induced DNA breaks. The cellular phone industry had insisted for fifteen years that no such effect could be obtained from radio frequency radiation. The research by

Appendix S

Verschaeve is but one of many similar reports that became known during 1994 and which supports the earlier findings of Cleary.

CVIII.

C.D. Cain disclosed in 1994 that 837 MHz radiation at a power density exposure level of 3.7mW/cm2 produced a 40% increase in what researchers refer to as "focus Formation." These researchers explained at the 16th Annual Bioelectromagnetics Society that the radio frequency radiation was acting as a co promoter for cancer formation.

CIX.

The Defendants knew, on or about June 12, 1994, that the notable researcher Henry Lai, (and others) presented a report that indicated low-level (0.6mW/g SAR) radio frequency radiation exposure at 2450 MHz resulted in memory deficits for experiments conducted with rats. This was a follow-up presentation of an article by Lai, Horita & Guy published only a few months earlier that provided substantially the same information. The memory deficits were observed as an inability of the rats to perform in a maze experiment. In effect, the rats forgot their way around a familiar area. The researchers explain the effects as being caused by a decrease in brain activity. The low-level radiation exposure is extremely significant. Virtually all operators of cell phones subject themselves to such exposure and energy absorption while operating the phone. Further, the memory deficits do not stop when the exposure ends. Researchers have learned that the effect persists for five days or more.

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CX.

Late in 1994 Lai and Singh made known the results of their research which should have been received as conclusive proof that cellular phone radiation is capable of causing harmful biological effects. The researchers reported in the International Journal of Radiation Biology that low-level exposure to radio frequency radiation causes an increase in single and double strand breaks in DNA.

CXI.

Lai and Singh repeated their earlier experiment with similar results in 1996. In 1997, Repacholi published the results of his work that demonstrated that mice exposed to low-levels of 900 MHz radiation exhibited a higher incidence of cancers than did their non exposed laboratory counterparts.

CXII.

Certain Defendant(s) acted in a wrongful, deceitful, intimidating, illegal, and harassing manner to researcher by the name of Dr. Jerry L. Phillips, who essentially replicated the DNA damage studies of Lai and Singh and reached the same conclusions, i.e., exposure to low-levels of radio frequency radiation causes DNA damage which can develop into cancer.

Appendix S

CXIII.

MOTOROLA willfully and wantonly attempted to suppress information from its customers, the public, and government regulatory agencies through improper pressure and intimidation upon Dr. Phillips.

CXIV.

After completion of his research, Dr. Phillips expressed his desire to publish said research. Initially, MOTOROLA told Dr. Phillips that is was too early to publish his results and that he needed to do more research. When Dr. Phillips refused to "spin" his research, as demanded by MOTOROLA, MOTOROLA cut off Dr. Phillips' funding. Additionally, MOTOROLA threatened to discredit Dr. Phillips in the scientific community, as well as to ruin his career.

CXV.

Dr. George Carlo is a notable public health scientist, epidemiologist, lawyer, founder of Health Risk Management Group, and the individual appointed by the cell phone industry to study the health hazards associated with WHHP use. After leading the research efforts regarding the health hazards associated with WHHP use for a period of six years, Dr. Carlo indicated that WHHPs may very well pose health risks to its user. In a response similar to that received by Dr. Phillips, the cell phone industry cut off Dr. Carlo's funding, attempting to discredit him with the scientific community, and attempted to ruin his career.

Appendix S

CXVI.

Motorola and all Defendants, in prior litigation and in this litigation, asserted to the Court that the Food and Drug Administration (the FDA) had taken action which preempted the claim brought herein. Defendants knew or were aware of sufficient facts that they should have known that the FDA had taken no such actions and that, indeed, due to cuts in funding and personnel the FDA cannot adequately do its job under the law.

CXVII.

By amending paragraph 7 of the original Petition to read as follows:

7.

> Prior to the filing of the original Petition and this First Supplemental and Amending Petition, at least one named plaintiff purchased one or more WHHPs manufactured and/or distributed by one or more of the named defendants and at least one of the named plaintiffs after learning of the existence of the hidden non-apparent danger of invisible emissions from WHHPs purchased a headset specifically to protect from and avoid exposure to harmful radio frequency radiation (RFR) in the absence of the use of the headset.

Appendix S

CXVIII.

By amending paragraph 8 of the original Petition to read as follows:

8.

Due to the inherent design of the WHHPs, WHHPs contain hidden vices or defects in that they emit unseen RFR which enters the users' brain through the location of the antenna proximate to the users' bones, skull, head and brain exposing plaintiffs and all users to risk of damage, injury to their health and well-being and unexpected changes in their physiology, all of which is due to the proximity of the antenna. The risk of changes and dangers arise from the fact that the WHHP receives various transmission which, through the antenna, direct the RFR directly into the user's body. The demonstrated risks include cellular damage and other adverse effects, including those identified in Paragraph LXXXII.

Appendix S

CXIX.

By amending paragraph 9 of the original Petition to read as follows:

9.

On information and belief it is alleged that all of the manufacturers and distributors and the CTIA and the Telecommunication Industry Association (TIA) knew, know, and have long known and/or should have known of the scientific information which indicates and establishes that plaintiff and other WHHP users are exposed to RFR which causes physical effects, changes and the risk of long term injury including the potential for very significant long term health problems. It is also alleged, on information and belief, that each and/or several of the defendants herein acting through the CTIA and/or TIA were privy to, aware of and affirmatively discussed, but withheld and failed to properly convey to the public, each of those concerns and realities.

Appendix S

CXX.

By amending paragraph 10 of the original Petition to read as follows:

10.

At all times the manufacturers and distributors knew or should have known of the feasible and economically reasonable method to insulate users from the undesired exposure to RFR and the physical effects and significant health risks arising therefrom, but, on information and belief, for economic and other reasons reflecting self-motivation, the manufacturers failed to incorporate the economically feasible, reasonable and safer headset design as a standard feature in their WHHPs, thus unnecessarily continuing to expose users to the non-apparent assault on their head, skull and brain and due to the exposure to RFR through the antenna.

CXXI.

By amending paragraph 11 of the original Petition to read as follows:

11.

The cure to the recognized problem caused by the non-apparent vice or defect is a headset which attaches to or is made part of the phone to allow

the operator to use the WHHP in such a fashion that the proximity of the cell phone to the head, skull and brain are maintained at a distance from the head.

CXXII.

By amending paragraph 12 of the original Petition to read as follows:

12.

The headset was feasible and economical at the time of manufacture and distribution of the phone, but were not incorporate as a standard feature of the WHHPs.

CXXIII.

By amending paragraph 13 of the original Petition to read as follows:

13.

Plaintiff, and others similarly situated, purchased WHHPs believing they were obtaining a safe product at an agreed upon price. The WHHPs were and are normally sold by the distributor defendants including Radiofone and Bell South Mobility/ Cingular at a deep discount in order to attract purchasers to purchase long term calling plans and services.

Appendix S

CXXIV.

By amending paragraph 14 of the original Petition to read as follows:

14.

In order to make their WHHPs safe, and to avoid the impact of the defect due to the non-apparent RFR and the manner in which it enters the head, skull or brain when the WHHP is in use plaintiffs would be required tc purchase, as a separate or after market accessory, a headset.

CXXV.

By deleting paragraph 15 of the original Petition

CXXVI.

By amending paragraph 16 of the original Petition to read as follows:

16.

Plaintiffs understood that when they purchased their WHHPs and obtained the related services that the necessary and complete costs for a safe phone had been identified, recognized, and made available to them in connection with their purchase of the WHHPs and the services.

Appendix S

CXXVII.

By deleting paragraph 17 of the original Petition.

CXXVIII.

By amending paragraph 18 of the original Petition to read as follows:

18.

The failure to incorporate or furnish an appropriate headset into the WHHPs resulted in a breach of warranty, breach of contract, and/or redhibitory defect, such that plaintiffs are entitled to have the WHHPs made safe by the manufac urers and distributors through the furnishing of a headset and/or to obtain a reduction in the price to the extent necessary to allow owners, users and lessees to purchase or receive a headset or a WHHP with a compatible headset in order to render the WHHPs safe and to avoid the risk of and/or unwanted aiterations of physiology and health effects.

Appendix S

CXXIX.

By amending paragraph 19 of the original Petition to read as follows:

19.

a) The failure to include a headset as needed to protect against RFR and its effects constitutes a negligent or intentional misrepresentation or the breach of contract for sale and/or lease and/or breach of implied and express warranty for fitness for its intended purpose and is a separate violation of 15 U.S.C. 2301, *et seq.* including 15 U.S.C. 2310 and/or is a redhibitory vice or defect.

CXXX.

(A) The Defendants have violated various provisions of the Magnuson-Moss Warranty Improvement Act, 15 U.S.C 230 *et seq.*, in that the implied warranty of fitness for a particular purpose has been breached by the Defendants in failing to provide a headset at the time of a cellular telephone.

(B) The Defendants have been given the opportunity to remedy the defect of the product by providing a headset to purchasers, but the defendants have failed to cure the defect.

(C) Moreover, the defendants, through their spokespersons, have repeated declared expressly that cellular telephones "are safe." This statement by Defendants' representatives amounts to an unauthorized express warranty of fitness for an intended purpose.

(D) There is ample evidence that the use of cellular telephones over time may be unsafe and *at a minimum* poses a risk of harm that warrants due consideration by Court and makes the *express* warranty of the manufacturer Defendants misleading and/or deceptive.

(E) As such, the Defendants have engaged in deceptive trade practices in violation of federal law. 15 U.S.C. 45, *et seq.* as incorporated by 15 U.S.C. 2310 (b).

(F) Remedies available under these provisions of federal law are warranted, and should be given to class claimants under 15 U.S.C. 2310, *et seq.*

(G) The claimants seek class certification under the provisions of the Magnuson-Moss Warranty Improvement Act.

Appendix S

CXXXI.

By amending paragraph 22 of the original Petition to read as follows:

22.

Based on the foregoing, plaintiffs, and all person similarly situated, are entitled to the following specific relief and all other relief available as a matter of law:

1. An appropriate headset compatible with their WHHP and/or funds, and/or a coupon for an appropriate headset compatible with their WHHP, or a reduction in price sufficient to obtain a headset. If there is no appropriate compatible headset for a WHHP, a WHHP with an appropriate headset.

2. With respect to all individuals who have already purchased such headsets, a reduction in the purchase price necessary to create reimbursement of the amount so paid;

3. Attorneys' fee plus all interest allowed as a matter of law.

Appendix S

CXXXII.

By deleting all claims under the Louisiana Unfair Trade Practices Laws, all claims for medical monitoring, all claims for emotional distress, pain and suffering, and by deleting all claims for any individualized physical injury.

CXXXIII.

By restating paragraph 23 of the original Petition to request a jury on all counts and all claims set forth herein.

WHEREFORE, plaintiffs pray that this First Supplemental and Amending Complaint be filed, and that each of the defendants be served and cited with same, and that after all proceedings are had there be judgment allowing this matter to proceed as a class action against defendants for all plaintiffs and class members is such amounts as are just, and as requested in the body of this Complaint including, but not limited to an appropriate headset or WHHP with compatible headset and/or coupon necessary to obtain a headset as may be necessary, reimbursement of amount paid for headsets, attorneys' fees and legal interest.

Appendix S

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IN THE

Supreme Court of the United States

NOKIA, INCORPORATED, *et al.*
Petitioners,

v.

GARRETT NAQUIN, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly determined that doctrines of implied conflict preemption do not foreclose state law consumer remedies relating to wireless hand-held telephones regulated by the Federal Communications Commission (FCC) that were sold with deceptive assurances of safety and without headsets that protect consumers against unwanted and unnecessary exposure to radiation and preventable risks of harm.

2. Whether §605(c)(1) of the Telecommunications Act of 1996 precludes resort to doctrines of implied conflict preemption of state law consumer remedies relating to wireless hand-held telephones that were sold to consumers with deceptive assurances of safety and without protective headsets.

3. Whether the Court of Appeals correctly interpreted 47 U.S.C. §332(c)(3)(A), which prohibits a state or local government from regulating market "entry" of commercial mobile services, but permits states to regulate the "other terms and conditions" of such services, in holding that the statute does not expressly preempt state law consumer remedies relating to wireless hand-held telephones that were sold to consumers with deceptive assurances of safety and without protective headsets.

LIST OF PARTIES

The Petition contains an accurate list of the Petitioners and Respondents. It should be noted, however, that this action asserts no pending claim against four of the Petitioners: AT & T Corporation, Ericsson Inc., NEC America, Inc., and Nextel South Corp. (incorrectly named as Nextel Communications, Inc). Respondents suggest that those four Petitioners lack standing to petition this Court for relief.

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Biological Effects of Radiofrequency Radiation, Second Report and Order, 2 F.C. C. R. 2064 (1987)..... 3
Cell Phone Facts: Consumer Information on Wireless Phones, http://www.fda.gov/cell phones/(joint FDA-FCC website)..... 7-8

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Office of Engineering and Technology, FCC, *Questions and Answers About Biological Effects and Potential Hazards of Radiofrequency Electromagnetic Fields*, OET Bulletin 56 (4th ed. 1999)	1-2
Petition of Pittencrief Communications, Inc., 13 F.C.C.R. 1735 (1997)	29
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JURISDICTION

The judgment of the court of appeals was entered on March 16, 2005.[1] A petition for rehearing and rehearing *en banc* was denied on April 12, 2005. Pet. App. 133a. The Petition was filed in this Court on August 10, 2005, within the time extended by order of the late Chief Justice on July 8, 2005. Jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES AND OTHER PROVISIONS INVOLVED

The statutes, regulations and other provisions involved in this action are reproduced in Respondents' Appendix hereto, supplementing Pet. App. 134a-183a.

STATEMENT OF THE CASE

1. FCC Regulation of RF Emissions. All wireless phone communications send and receive electromagnetic energy between antennae and base stations. The energy fields generated by transmission of radio signals, known as radio frequency (RF) radiation, affect the environment. High levels of RF radiation can be harmful due to its thermal effects, *i. e.*, the ability of RF energy to heat human tissue. This has been known for years. *See* Office of Eng'g. and Tech., FCC, *Questions and Answers About Biological Effects and Potential Hazards of Radiofrequency Electromagnetic Fields*, OET Bulletin 56, at 6 (4th ed. 1999). The "non-thermal" effects are less understood. At relatively low levels of exposure to RF radiation, too low to produce significant heating, biological effects have been reported by scientific laboratories. These

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[1] In the proceedings below, this case was consolidated with four others. The Petition asserts that the Fourth Circuit's opinion "embodies two judgments" – one regarding the question of federal jurisdiction that applies only to the other four cases, and a second on the question of federal preemption that applies only to the instant case. Petition, at 1, n.1. In fact, the Fourth Circuit entered only one judgment reversing separate orders of the district court. Pet. App. 43a. See Rule 36, F.R.A.P.

reported effects have included changes in the immune system, neurological effects, behavioral effects, a "calcium efflux" effect on brain tissue and DNA effects. *Id.* at 8. According to the Federal Communications Commission (FCC), "whether or not such effects might indicate a human health hazard is not presently known." *Ibid.* Further research is needed. *Ibid.*

In 1985, for the first time, the FCC issued guidelines regarding human exposure to RF radiation from FCC-regulated facilities. Report and Order, *Biological Effects of Radiofreqency Radiation*, 100 F. C. C. 2d 543 (1985). The FCC order implemented the National Environmental Policy Act of 1969 (NEPA), 42 U. S. C. §§ 4321 *et seq.* *See* Report and Order, *supra*, 100 F.C.C.2d 543 (¶¶ 1-3, 8). In enacting NEPA, Congress declared it to be "the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony . . . ." 42 U.S.C. § 4331(a). To these ends, all federal agencies, including the FCC, are required to assess the environmental impact of their proposed actions. 42 U.S.C. § 4332(2)C)(ii).

In its 1982 notice of proposed rulemaking, FCC acknowledged that it lacked primary jurisdiction to promulgate health and safety standards for RF radiation. Notice of Proposed Rulemaking, *Biological Effects of Radiofrequency Radiation*, 89 F.C. C. 2d 214 (¶ 183) (1982). Nevertheless, FCC explained that NEPA required it to consider whether the activities it licenses and authorizes will significantly affect the environment. *Ibid.* For that reason, FCC proposed amending its rules so as to assure that, with regard to RF radiation, its authorization of radio equipment or operations would not result in significant environmental impact. *Ibid.* The FCC did not seek to impose any substantive requirement upon its regulatees, but would use noncompliance "as the trigger for invoking our environmental processing procedures." *Id.* (¶ 187). The FCC reported that state

and local authorities already had adopted regulations regarding human exposure to RF radiation. *Id.* (¶ 188).

In the absence of any federal standards, the FCC adopted radiation guidelines in 1985 that had been issued by the American National Standards Institute (ANSI), a private organization. Report and Order, 100 F. C. C. 2d 543 (¶¶ 8, 22). In so doing, the FCC reaffirmed its procedural duties under NEPA. *Id.* (¶¶ 1-3, 8, 22, 29-30). FCC acknowledged "that it lacked the authority to develop its own health and safety standards" (*id.*, ¶ 49), but decided that use of ANSI guidelines would best fulfill its statutory obligations under NEPA. *Id.* (¶¶ 23-24). Noncompliance with ANSI guidelines was to be the trigger for invoking the FCC's environmental procedures implementing NEPA. *Id.* (¶¶ 26-27, 53). The FCC's 1985 action, however, was limited in scope. As the Petition observes, "[m]any low power devices, including wireless telephones, were 'categorical[ly] exclu[ded]' from NEPA obligations . . ." Petition, at 9. That is an understatement. In fact, the FCC regulation implementing NEPA applied only to radio and television broadcast facilities, satellite earth stations and experimental facilities. Report and Order, *supra* (¶¶ 1, 54-57) and Appendix 1. *All other* types of FCC-licensed facilities and systems, including "cellular," were to be categorically excluded from FCC regulation of exposure to RF radiation. *Id.* (¶¶ 46, 58). *See* Second Report and Order, *Biological Effects of Radiofrequency Radiation*, 2 F.C. C. R. 2064 (¶¶ 15-16, 24) (1987) (ordering categorical exclusion).

In 1992, ANSI adopted new, more restrictive guidelines regarding permissible RF exposure. Notice of Proposed Rulemaking, *Guidelines for Evaluating the Environmental Effects of RF Radiation*, 8 F.C.C.R. 2849, 2850 (¶ 6) (1993). These changes included removal of categorical exclusions of certain low-power devices, including hand-held wireless telephones. *Id.*, 2850 (¶ 7). To meet its NEPA obligations (*id.*, 2854, ¶ 31.A.), the FCC proposed replacing the 1982 ANSI guidelines with the 1992 version. *Id.* (¶¶ 8-9). FCC rulemaking

would consider whether hand-held portable devices, like cellular telephones, must be evaluated according to the revised standards. *Id.*, 2852 (¶ 16).

While rulemaking went forward, Congress enacted the Telecommunications Act of 1996 (TCA). Section 704 of the TCA contained two provisions relating to FCC regulation of the environmental effects of RF radiation. The Petition focuses upon § 704(b) of the TCA, in which Congress directed the FCC within 180 days to complete its rulemaking and prescribe rules regarding the environmental effects of RF "emissions".[3] Petition, at 10. The Petition concludes from legislative history[4] that this call "for swift action" was "based upon Congress' judgment" that national uniformity and a balance between public health and the speedy deployment of wireless services were major objectives of the TCA. Petition, at 10, 20.

The other TCA provision, TCA § 704(a), was a major subject of discussion below and was considered in depth in the

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[3] The Petition's reference to "radio frequency *transmissions*" (at 10) is in error. The statutory text is accurately set forth in Pet. App. 135a.

[4] The Petition (at 10) quotes two passages from the Report of the House Commerce Committee, which wrote the initial draft of §704 of the TCA, but fails to note that both passages were limited in context to "siting and zoning decisions" of state and local governments. H. R. Rep. No. 204, 104th Cong., 1st Sess. (1995) at 94-95. The Petition also overlooks the fact that the Report was later superseded by the Report of the House Conference Committee, which rewrote the Commerce Committee bill. H. Conf. Rep. No. 458, S. Rep. No. 230, 104th Cong., 1st Sess. (1996). "The conference agreement created a new section 704 which *prevents* Commission preemption of local and state land use decisions and *preserves* the authority of state and local governments over zoning and land use matters except in the limits set forth in the conference agreement." *Id.*, 207-208 (emphasis added). *See City of Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453, 1462-63 (Mar. 22, 2005) (Breyer, J., concurring) (in enacting the TCA "Congress ultimately rejected the national approach and substituted a system based on cooperative federalism").

opinions of both courts. *See* Pet. App. 35a-38a, 41a-44a, 59a-60a, 66a-67a, 88a-90a. Section § 704(a) defined the preemptive reach of the regulations that § 704(b) directed the FCC to prescribe. Section 704(a) added a new subsection, 47 U.S.C. § 332(c)(7), entitled "[p]reservation of local zoning authority," which included an express pre-emption clause:

> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions *to the extent that such facilities comply with the Commission's regulations concerning such emissions.*

47 U.S.C. § 332(c)(7)(B)(iv) (2000)(emphasis added). Prior to passage of the TCA, state and local governments were regulating the environmental effects of RF radiation. Without specific statutory authority to intervene in that area, the FCC declined to preempt such state and local regulations. *See* Notice of Proposed Rulemaking, *Procedures for Requests for Relief from State and Federal Regulations*, 12 F.C.C.R. 13,494, 13,542-43 (¶ 120) (1997). The FCC regarded § 332(c)(7)(B)(iv) as providing the needed preemptive authority. *Id.*, 13,543 (¶ 122).

On August 1, 1996, the FCC adopted new guidelines for evaluating the environmental effects of RF radiation emitted by all licensed activities. Report and Order, *Guidelines For Evaluating the Environmental Effects of Radiofrequency Radiation*, 11 F.C.C.R. 15,123 (1996). For the first time, the FCC's RF radiation regulations covered "portable devices" such as wireless handheld telephones designed to be used against the head or within 20 centimeters of the body. *Id.*, 15,147 (¶ 63) and 15,217, adopting 47 C. F. R. § 2.1093. The regulation of portable devices was attributed to the FCC's "responsibilities under [NEPA] to evaluate the environmental significance of its actions." 47 C. F. R. § 2.1093(a). Portable devices became subject to routine evaluation for RF radiation prior to equipment authorization or use. 47 C.F.R § 2.1093(c). The exposure limits were quantified in terms of specific ab-

sorption rate (SAR). SAR limits applicable to "general population" exposure to "portable devices" is 1.6 watts/kg, averaged over one gram of tissue. 47 C.F.R § 2.1093(d)(2). *See* 1996 Report and Order, *supra*, 11 F.C.C.R. at 15,140-15,152 (¶¶ 46-74), 15,218-19. Before adopting its "portable device" regulation, the FCC received comments from federal health and safety agencies such as the Food and Drug Administration (FDA).[5] *Id.*, 15,125 (¶ 2). The FCC also adopted a regulation patterned on 47 U. S. C. § 332(c)(7)(B)(iv) and incorporated *verbatim* its preemptive language. 47 C.F.R. § 1.1307(e).

Ever since the TCA took effect and the FCC adopted its radiation guidelines, scientists have debated whether the public is adequately protected against non-thermal effects of long-term exposures to low levels of RF radiation from wireless phones. The FCC guidelines have been held to comply with NEPA procedures. *EMR Network v. FCC*, 391 F.3d 269 (D. C. Cir. 2004); *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 90-92 (2d Cir. 2000). Nevertheless, the scientific community remains concerned about the health effects of low-level but long-term exposures.

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[5] In its Report and Order, the FCC acknowledged the FDA's "general jurisdiction for protecting the public from potentially harmful radiation from consumer and industrial devices . . . such as cellular telephones." 11 F.C.C.R. at 15,130, ¶ 18. Under the delegated authority of the Electronic Product Control Act of 1968, 21 U. S. C. §§ 360hh-360ss FDA "shall by regulation prescribe performance standards for electronic products to control the emissions of electronic product radiation from such products if [FDA] determines that such standards are necessary for the protection of the public health and safety." 21 U. S. C. § 360kk(a)(1). If FDA performance standards have been prescribed by regulation and have taken effect., they preempt non-identical state and local standards. 21 U. S.C. § 360ss. FDA has not issued regulations prescribing a standard applicable to radiation-emitting wireless telephones. Meanwhile, in the absence of an applicable FDA regulation, States retain authority to establish or continue in effect performance standards of their own. *Ibid.*

The Petition notes that the FCC's website proclaims that any wireless phone that conforms to its SAR guidelines is a "safe" phone. Petition, at 20, n.4. Elsewhere, however, the FCC is much more guarded in its evaluation of safety. Handheld wireless phones "can expose the user to measurable radio-frequency energy (RF) because of the short distance between the phone and the user's head." *Cell Phone Facts: Consumer Information on Wireless Phones*, at http://www.fda.gov/cellphones/qa.html (joint FDA-FCC website, last updated July 29, 2003). Currently, no assurance can be given that these devices are "absolutely safe." *Ibid.* There remain many unresolved "questions about the possible effects of low levels of RF energy." *Ibid.* Scientific studies have produced conflicting and inconclusive results; "none of the studies can answer questions about long-term exposure" and "it is generally agreed that further research is needed to determine what effects actually occur and whether they are dangerous to people." *Ibid.*[5] In the meantime, consumers are advised that "[w]hen the phone is located at greater distances from the user, the exposure to RF is drastically lower because a person's RF exposure decreases rapidly with increasing distance from the source." *Ibid.*

> If you must conduct extended conversations by wireless phone every day, you could place more distance between your body and the source of RF, since the exposure level drops off dramatically with distance. For example, you could use a headset and carry the wireless phone away

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[5] The National Toxicology Program of the Department of Health and Human Services offers a more recent assessment: FCC "guidelines are based on protecting the user from acute injury from thermal effects produced by radio-frequency radiation. *Current data are insufficient to draw definitive conclusions concerning the adequacy of these guidelines for protecting against potential adverse effects of chronic exposure.*" *Radio-frequency Radiation Emissions from Cellular Phones*, http://ntp-server.niehs.nih.gov/files/cellphones.pdf, last updated March 7, 2005 (emphasis added).

from your body or use a wireless phone connected to a remote antenna. *Ibid.*

No FCC regulation forbids licensees from passing along such advice to consumers. By FCC definition, members of the "general population" are persons "who may not be fully aware of the potential for exposure or do not exercise control over their exposure" to RF radiation from portable devices. 47 C.F.R. § 2.1093(d)(2). Headsets enable consumers to control their exposure. No FCC regulation forbids licensees from providing consumers with headsets.

2. Proceedings Below. Contrary to the question presented in the Petition (at i), this case does *not* "seek to declare FCC-approved wireless telephones 'unreasonably dangerous' as a matter of state law." Rather, it assumes that consumers are entitled to know that they are being exposed to unwanted radiation and to be equipped with a practical means of avoiding any such exposure.

The case originated on May 27, 2000, with the filing of a class action petition for damages in the Civil District Court of Orleans Parish, Louisiana, by Garrett E. Naquin and others, individually and on behalf of a class of wireless telephone consumers. The class action petition alleged that Petitioners manufacture or distribute wireless telephones that direct RF radiation into the ear and brain, exposing users to risks of significant long term-health problems and injury. The petition alleged that Petitioners knew the health risks but failed to protect users by means of headsets permitting the phone to be used at a distance from the ear. It was alleged that headsets are economically feasible and currently available. The petition asserted claims of breach of warranty, redhibition, misrepresentation, and breach of contract under Louisiana law.

Petitioners removed the case to the United States District Court for the Eastern District of Louisiana *solely* on the basis of diversity of citizenship. Petitioners answered the class action petition and moved for judgment on the pleadings,

contending that the claims are preempted by the Electronic Product Radiation Control Act of 1968, 21 U. S. C. §§ 360hh-360ss. Petitioners argued that the Act vested in the FDA the "exclusive" authority to establish standards of safety with respect to products that emit RF radiation, such as portable telephones. The district court denied Petitioners' motions (*see* Pet. App. 63a) and declined to certify an interlocutory appeal pursuant to 28 U.S. C. § 1292(b).[6]

Respondents then filed their first supplemental and amending class action complaint. Pet. App. 186a-241a.[7] The complaint alleged that the action arose out of wireless telephones manufactured and distributed without headsets that protect users from RF radiation emitted from the antenna to the ear. Pet. App. 189a. It alleged that users are exposed to unwanted RF radiation creating health risks and such adverse effects as nerve damage, cellular damage and cellular dysfunction. *Ibid.* The complaint summarized numerous studies that have documented these risks and adverse effects. Pet. App. 190a-203a. It alleged that Petitioners were aware of the effects of long-term exposure to emissions, but failed to inform consumers that RF radiation absorbed in bodily tissue can result in undesired biological changes and health risks. Pet. App. 203a-204a. Petitioners were charged with deceiving consumers into believing that wireless telephones operate at power levels too low to cause any health risks and, in the absence of headsets, are completely safe for use, and in ignoring research studies demonstrating

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[6] Having litigated and lost on the issue of FDA preemption, Petitioners here downgrade the FDA's regulatory authority from "exclusive" to merely "overlapping." Petition, at 12.

[7] That complaint, as appended to the Petition, later was superseded by a second supplemental and amending class action complaint filed in the District of Maryland. C. A. App. 966-1021. The latter complaint is not appended to the Petition, although it served as the basis of the district court's dismissal of the action on preemption grounds and the Fourth Circuit's review of that dismissal.

that such unqualified assurances are unwarranted. Pet. App. 204a-206a, 210a-221a, 222a-229a. The complaint also alleged that Petitioners have suppressed research findings that undermine their assurances of safety (Pet. App. 206a-207a, 216a-217a, 228a-229a), while understating known or potential health risks that might discourage sales. Pet. App. 208a-209a. Despite scientific findings that the antenna is the most efficient means of depositing energy into the body and penetrating human tissue, especially the brain (Pet. App. 211a-212a, 214a-215a), the complaint alleged that Petitioners have failed to provide consumers with headsets that insulate consumers from undesired and unnecessary close-range exposure to RF radiation. Pet. App. 233a-234a. Contrary to the Petition (at 13), the complaint did *not* assert product liability claims. Rather, it explicitly deleted all such claims. Pet. App. 240a. The complaint reasserted claims under the Louisiana law of redhibition, breach of warranty, breach of contract and misrepresentation. Pet. App. 236a-237a. In addition, the complaint added federal claims under the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.* Pet. App. 237a-238a.

Petitioners moved to dismiss the state-law claims as insufficient as a matter of Louisiana law. Those motions were briefed and argued, and were awaiting decision on October 31, 2001, when the Judicial Panel on Multidistrict Litigation ordered transfer of the Louisiana case to the United States District Court for the District of Maryland for consolidation with four similar actions. *In re Wireless Telephone Radio Frequency Emissions Prods. Liab. Litig.*, 170 F. Supp.2d 1356 (J.P.M.L. 2001). The other actions had been brought in Georgia, Maryland, New York and Pennsylvania state courts on various theories of negligence, strict product liability, breach of implied warranty, fraud, civil conspiracy and consumer protection law violations. The complaints in those four actions pleaded only state-law claims. Nevertheless, they were removed on federal question grounds. On June 21, 2002, the district court denied motions to remand those cases. Pet.

App. 129a. Respondents were not involved in the removal-remand proceedings.

Petitioners moved pursuant to Rule 12(b)(6), F. R. Civ. P., to dismiss all five actions (including the Louisiana case) on grounds that each was preempted by federal law. First, they contended that a state-imposed headset requirement was expressly preempted as "entry" regulation within the meaning of 47 U.S.C. § 332(c)(3)(A). Second, Petitioners argued that the claims also were expressly preempted by the TCA provision that precludes state or local regulation of the placement, construction and modification of personal wireless facilities on the basis of the environmental effects of RF radiation. 47 U.S.C. § 332(c)(7)(B)(iv). Third, Petitioners asserted that Congress had occupied the field of RF emissions from wireless phones, leaving no room for state regulation. Finally, Petitioners alleged that the claims are preempted because they conflict with federal objectives of national uniformity in regulation and the need to balance rapid deployment of a seamless, nationwide wireless network with adequate protection of the public.

Respondents opposed the motion to dismiss. They also filed their second supplemental and amending class action complaint on September 19, 2002. C.A. App. 966-1026. This complaint superseded their first complaint (Pet. App. 186a-241a), adding new paragraphs and deleting others. In particular, Respondents added new claims for fraud by concealment, civil conspiracy to defraud, and unjust enrichment. C.A. App. 1007-14. Claims previously alleged, including state-law claims of redhibition and federal claims under the Magnuson-Moss Warranty Act, were reasserted. For each Respondent and class member the complaint requested (1) a headset or funds to purchase a headset compatible with the individual's phone; or (2) reimbursement for the cost incurred previously to acquire a headset, or (3) a replacement phone

that can be used with a headset. Contrary to the Petition (at 13), no injunction was requested.

On March 5, 2003, without deciding other theories of preemption, the district court dismissed all five actions on the basis of conflict preemption. Pet. App. 74a, 76a. Specifically, the court concluded that "plaintiffs' state tort lawsuits stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' [citation omitted], namely, deference to the expertise of federal agencies, the development of national uniform standards, and the balance between developing a wireless telecommunications system and protecting the public." Pet. App. 72a. *See also* 64a-65a, 73a. The court attributed those purposes and objectives to the TCA's legislative history and enactment. Pet. App. 66a-67a.

A panel of the Fourth Circuit reversed. Pet. App. 4a-45a. The panel (Luttig and Michael, Circuit Judges, and Kiser, Senior District Judge) was divided on the question of removal jurisdiction, Judge Kiser dissenting. Pet. App. 50a. In regard to the Louisiana case, which raised no jurisdictional issue, the panel reversed the order dismissing that case on preemption grounds. The panel reviewed the statutory provisions invoked by Petitioners, 47 U.S.C. §§ 332(c)(3)(A) and 332(c)(7)(B)(iv), and concluded that the state-law claims were not expressly preempted by either provision. Pet. App. 35a-40a. The panel also disagreed with the district court's finding of conflict preemption. Pet. App. 41a-45a. It noted that "[t]he district court relied on § 332 of the FCA to find a sweeping congressional objective" of subjecting all wireless communications to national RF standards. Pet. App. 41a-42a. The panel found no evidence from which to imply a congressional goal of achieving preemptive national RF radiation standards for wireless telephones. Pet. App. 42a-43a. It also concluded that a headset remedy would not stand as an obstacle to the federal goal of achieving national coverage of wireless communications. Pet. App. 45a. The panel also ruled out field preemption. *Ibid.* The order dismissing the Louisiana claims was

reversed and the case remanded to the district court for further proceedings. Pet. App. 45a. Petitioners requested rehearing and rehearing en banc but their petition was denied. Pet. App. 133a. No member of the Court or the panel requested a poll. *Ibid.*[8] There was no dissent.

REASONS FOR DENYING THE WRIT

I. The Issue Of Conflict Preemption Was Correctly Decided And Does Not Require Plenary Review By This Court.

1. This case poses finality problems that the Petition overlooks. First, the judgment under challenge has not yet become final. Although this Court has jurisdiction to review interlocutory decisions of federal courts, it rarely does so and should not do so here. *See* Stern and Gressman, *Supreme Court Practice* § 418 (8th ed. 2002). The decision below leaves the trier-of-fact free to decide in favor of the Petitioners on any permissible ground other than preemption. If Petitioners prevail, further review of the questions presented would be unnecessary. If Respondents prevail, a definitive resolution of those questions would benefit from a final judgment and a concrete factual record. In either event, stepping in now can only delay the resolution of a five-year old case in which the issues still depend upon mere allegations and inferences drawn from pleadings.

Second, in addition to state-law claims, this action includes claims pending under the Moss-Magnuson Warranty Act, 15 U.S.C. §§ 2301, *et seq.* Pet. App. 237a-238a. The Fourth Circuit did not pass on the merits of the federal claims, but

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[8] Petitioners proffer a form dated April 11, 2005, authorizing amicus participation by the FCC in support of their rehearing petition. Pet. App. 184a. Petitioners speculate that this form expresses "the FCC's view that the panel decision was wrong and should be reviewed by the full court." Petition, at 16. In fact, the FCC never contacted the court of appeals nor attempted to file an amicus brief. *See* Rule 29, F. R. A. P.

remanded them to the district court for further proceedings. Those claims will remain unresolved even if this Court were to review the questions presented by the Petition involving preemption of the state-law claims.

2. The Petition raises two questions. The first asks whether federal law preempts claims that "seek to declare FCC-approved wireless telephones 'unreasonably dangerous' as a matter of state law." Petition, at i. The second question is whether a federal statute "precludes state law from imposing new RF *standards* or operational *requirements*" on wireless telephones." *Ibid* (emphasis added). Both questions are premised upon the misconception that this action "alleged that FCC-approved wireless telephones are defective products and unreasonably dangerous under the product liability and tort laws" of Louisiana. Petition, at 12-13, 20, 21. The Petition assumes that the action will establish various state-law "standards", "requirements" or "mandates". Petition, at 3, 4, 17, 21, 23, 24. In fact, the action exhibits none of these characteristics. It asserts no product liability claim in which proof of an "unreasonably dangerous" product would be a necessary element. It does not seek to impose any standard, requirement or mandate under state law in conflict with federal law. In short, this action is beyond the scope of the questions presented.

Petitioners did not attempt below to examine the Louisiana causes of action. As a result, the lower courts have not defined the specific claims asserted. Review of this case might oblige this Court either to explore Louisiana civil law concepts or else remand the case for that purpose. Because conflict preemption "turns on the identification of 'actual conflict'" between a state legal requirement and federal law, Petition, at 19, quoting *Geier v. American Honda Motor Co.*, 529 U. S. 861, 884 (2000), it is necessary to identify a requirement—a rule of law that must be obeyed. *Bates v. Dow Agrosciences LLC*, 125 U. S. 1788, 1799 (Apr. 27, 2005).

In this case the express warranty and contract claims are based not upon state-imposed requirements but, rather, upon volitional activities of Petitioners. Rules of Louisiana law enforcing their voluntary undertakings plainly do not qualify as requirements. *Bates*, 125 S. Ct. at 1798. *See Cipollone v. Liggett Group, Inc.*, 505 U. S. 504, 526 (1992) (plurality opinion). Although claims of fraudulent concealment and civil conspiracy may impose requirements, they do not conflict with federal law. Those claims are predicated on state-law duties not to conceal material facts and not to conspire to commit fraud. *Id.* at 528, 530. FCC regulations neither require nor permit Petitioners to engage in such misconduct.

That leaves Respondents' claim of redhibition—a cause of action unique to Louisiana. The claim is defined by LA. CIV. CODE ANN. Art. 2520 (West 2003). See Pet. App. 56a, n. 7. There is a subset of rules, including the seller's option to repair or replace the thing sold. *Id.* arts. 2522, 2531. Redhibition is analogous to a claim for full or partial rescission of a sale and recovery is limited to economic loss only. *See, e.g., Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 250-51 (5th Cir. 2002). The Code treats a redhibition suit as a contractual action and the remedy is related to the contract of sale. *Touro Infirmary v. Sizeler Architects*, 900 So.2d 200, 205-06 (La. App. 2005). As a contractual remedy for a voluntary undertaking between parties to a sale, redhibition does not impose a state law requirement. *Bates*, 125 S. Ct. at 1798.

There is no inevitable conflict between pre-existing Louisiana consumer remedies and the FCC's later decision to regulate the RF radiation of wireless phones. Traditional exercise of a State's police powers ordinarily co-exists with federal regulation, in the absence of a clear and direct conflict. Although the FCC was obliged to consider the effect of its actions on the environment, that is all that NEPA requires. *See Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772-73 (1983). NEPA does not dis-

place state remedies for the protection of consumers against harms only remotely connected to changes in the environment. FCC regulates "portable devices intended for use by consumers," 47 C.F.R. § 2.1093(d)(5), but such intended use—in close proximity to the human ear—has less impact upon the environment than upon the consumer, whose use is unregulated. Even among federal agencies, the FCC lacks primary jurisdiction over product safety and consumer protection matters historically belonging to the States.

Petitioners unleash a parade of horribles that would materialize if state law entitles consumers to headsets and instructions for use. According to the Petition, the decision below will allow state courts to impose "design, labeling and equipment mandates for wireless telephones" (at 3) and "will threaten the ability of the wireless network to serve critical national security and public safety functions" (at 17). These doomsday predictions, however, are not supportable by the claims actually asserted or the relief sought. Of course, if successful, those claims might induce Petitioners to honor their voluntary undertakings and tell the truth.

As the Fourth Circuit concluded, "[i]t is difficult to understand how a headset requirement (the specific relief sought) would affect the establishment of a nationwide wireless network or the availability of wireless service coverage." Pet. App. 44a-45a. The FCC contemplates headset use by consumers who are concerned about RF exposure. *See* discussion, *supra*, pp. 7-8. Judging by their websites, Petitioners market a variety of headsets for use in conjunction with the handheld phones they make or distribute. Headsets are offered as optional accessories and, occasionally, have been given away as promotional items in conjunction with service plans.

The fact that a portable wireless telephone is a regulated product does not affect its status as a consumer product. Once a product enters the stream of commerce it is placed in the hands of consumers beyond practical control of the FCC or its

licensees. At that point the State's police power is paramount. If the product is not what was warranted, promised or represented, federal regulation is not a compelling reason either for depriving a consumer of state remedies or for conferring automatic immunity upon the warrantor, the promisor or the dissembler.

3. The Petition's lead argument centers on the law of agency conflict preemption. Petition, at 17, 18-19. Under that doctrine a federal agency, acting within the scope of its congressionally delegated authority, may preempt state regulation. *Fidelity Fed. Savs. & Loan v. de la Cuesta*, 458 U.S. 141, 152-54 (1982). In such a case a "narrow focus on Congress' intent to supersede state law [is] misdirected." *Id.* at 154. Agency conflict preemption thus differs from ordinary conflict preemption that arises when state regulation is so inconsistent with federal regulation that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Louisiana Pub. Svc. Comm'n. v. FCC*, 476 U.S. 355, 369 (1986). These contrasting varieties of conflict preemption "raise two quite different questions." *New York v. FERC*, 535 U. S. 1, 17 (2002).

The Petition complains that the decision below is "myopic" because it failed to identify and thus "disregarded" the "bedrock principles" of agency conflict preemption. Petition, at 18. The short answer to that contention, however, is that Petitioners never argued agency conflict preemption in support of their Rule 12(b)(6) motion to dismiss nor discussed it in the proceedings below. For that reason, and that reason alone, the question was not passed upon by the district court or the court of appeals. It is not properly before this Court.

Petitioners direct their criticism to the Fourth Circuit alone: "Had the panel majority asked the right question," the Petition confides, the answer would have been "yes", as the district court concluded. Petition, at 19. The Petition does not pause to identify the "right question", as actually posed by the

district court: "The question, then, is whether permitting these lawsuits would 'stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Pet. App. 64a. That is exactly the question addressed, each in turn, by the district court (Pet. App. 65a-74a) and the Fourth Circuit (Pet. App. 41a-45a). In answering that question, both courts examined diligently the purposes and objectives of Congress, apparently oblivious to the other question that Petitioners never briefed nor argued but that they *now* say is central to their case.

The failure of the opinions below to discuss agency conflict preemption speaks volumes as to the extent that the doctrine was presented to the lower courts. It is uncharitable, if not disingenuous, for the Petition (at 18) to blame the Fourth Circuit for having "disregarded" a question that was never presented to either court with reasonable clarity. The reality is that the Fourth Circuit was denied fair opportunity to pass upon the question now surfacing for the first time in this Court. Its belated assertion here does not merit review. *See, e.g., Sprietsma v. Mercury Marine*, 537 U. S. 51, 56, n.4 (2002) (contention that maritime law governs preemption analysis not considered because it was not raised below).

4. Even if the question of agency conflict preemption was properly before the Court, that question ultimately must be resolved against Petitioners. Under that doctrine, "a federal agency may pre-empt state law only when and if it is acting within the scope of a congressionally delegated authority." *Louisiana Pub. Svc. Comm'n.*, 476 U. S. 355, 374 (1986). The Petition (at 18) declares that Congress "indisputably" has authorized the FCC to regulate the level of RF radiation emitted by wireless phones. The Petition, however, fails to identify the exact source of that authority or the particular FCC regulation meant to displace state health and safety laws. Nowhere does the Petition even mention § 704(a) of the Telecommunications Act of 1996 (TCA) or 47 U. S. C.

§ 332(c)(7)(B)(iv), enacted as part of § 704(a). Those provisions, and TCA § 601(c)(1), refute the Petitioners' argument.

Clearly, "the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of its authority granted by Congress to the agency." *Louisiana Pub. Svc. Comm'n.*, 476 U. S. at 374. *See New York v. FERC*, 535 U. S. 1, 18 (2002). The FCC has pinpointed the source of its authority to regulate the subject of wireless phone radiation: "FCC derives its authority to regulate wireless telephones from the National Environmental Policy Act of 1969 (NEPA) and the Telecommunications Act of 1996." *Cell Phone Facts: Consumer Information on Wireless Phones*, available at http: www.fda.gov/cellphones/ (joint FDA-FCC website last updated June 30, 2005).

Petitioners have never contended that NEPA was intended to give the FCC any authority to displace conflicting state and local health and safety regulations. NEPA does not confer special authority upon the FCC, but imposes obligations on *all* federal agencies to consider the environmental impact of their proposed actions. 42 U.S.C. § 4332(2). NEPA imposes only procedural obligations. *Department of Transp. v. Public Citizen*, 541 U. S. 752, 756 (2004). "NEPA does not mandate particular results, but simply prescribes the necessary processes." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). "Because NEPA imposes no substantive requirement that mitigating measures actually be taken, it should not be read to require agencies to obtain an assurance that third parties will implement particular measures." *Id.*, at 353, n. 16.

There is no indication that Congress intended agency environmental regulations implementing NEPA to have the effect of superseding state health and safety standards. Congress declared that "cooperation with State and local governments" was part of the continuing policy of the federal government.

42 U.S.C. § 4331(a). Nor has the FCC construed NEPA as statutory authority for preempting state and local regulation of the environmental effects of RF radiation. Even before it began regulating the subject, FCC recognized that state and local authorities already were regulating human exposure to RF radiation. Notice of Proposed Rulemaking, *Biological Effects of Radiofrequency Radiation*, 89 F. C. C. 2d 214, ¶ 188 (1982). In 1985, when the FCC began regulating the environmental effects of RF radiation, its regulations did not apply to wireless telephone systems, facilities or portable devices; all were categorically excluded. *See* discussion, *supra*, p. 3. The FCC then disclaimed "the authority to develop its own health and safety standards" (*ibid*), much less the authority to impose any standards on other federal agencies or state governments. State and local regulation in this area remained in effect well past the advent of the TCA.

Section 704 of the TCA marked the first occasion that Congress expressly addressed FCC regulation of the environmental effects of RF radiation. In § 704(b), Congress directed the FCC within 180 days to prescribe rules regarding the environmental effects of RF emissions. In addition, although the Petition does not refer to it, § 704(a) of the TCA gave express preemptive effect to the FCC regulations that § 704(b) directed the FCC to prescribe, but only to the extent stated in 47 U.S.C. § 332(c)(7)(B)(iv):

> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions *to the extent that such facilities comply with the Commission's regulations concerning such emissions.*

47 U.S.C. § 332(c)(7)(B)(iv) (2000) (emphasis added).

The FCC has recognized the TCA as delegating new regulatory authority that it lacked previously. Before the TCA was enacted, the FCC did not construe NEPA as authorizing pre-

emption. NEPA took effect in 1969 and remained in effect while state and local authorities were adopting ordinances that restricted the siting of wireless facilities based upon concerns about RF radiation. Notice of Proposed Rulemaking, *Procedures for Requests for Relief from State and Federal Regulations*, 12 F.C.C.R. 13,494, 13,542-43, ¶ 120 (1997). At that time the FCC believed that it lacked the statutory authority needed to preempt such pre-1996 ordinances:

> Prior to passage of the Telecommunications Act [of 1996], there was no specific statutory authority providing that the Commission had jurisdiction over issues concerning environmental effects of RF emissions. Issues concerning RF emissions were reviewed by the Commission on a case-by-case basis. Without the specific statutory authority, the Commission declined to preempt such state and local regulations.

Id. With passage of the TCA, the FCC found the specific authority it needed to preempt state and local regulations. *Id.* at 13,543, ¶ 122. Without passage, there would have been no rational basis for the FCC to alter its longstanding pattern of declining requests for preemption. The FCC reacted to passage by amending its NEPA regulation to incorporate the exact language of 47 U.S.C. § 332(c)(7)(B)(iv). *See* 47 C.F.R. § 1.1307(e) (not cited in the Petition and omitted from Pet. App.).

In the district court and again on appeal, Petitioners argued that the state-law claims were expressly preempted by § 332(c)(7)(B)(iv) and, moreover, were impliedly preempted because they would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Although the Petition presents no question involving § 332(c)(7)(B)(iv) or its interpretation, Petitioners continue to rely upon its legislative history as expressing the purposes and objectives of Congress that are being advanced by FCC regulation and that will be frustrated if the claims are

allowed to proceed. *See* Petition, at 10-11, 21. In short, the TCA fuels their conflict preemption argument.

The Fourth Circuit determined that § 332(c)(7)(B)(iv), viewed in context, applies to infrastructure-related "facilities", not to portable devices like wireless phones. Pet. App. 35a-38a. The Petition does not challenge this determination or the court's rejection of the express preemption defense. Instead, it contends that the court erred "by holding that the absence of express preemption creates a presumption against conflict preemption." Petition, at 22. What the court actually held was that "Congress has been very careful to preempt expressly only certain areas of state law, preserving the remainder for state regulation." Pet.App. 43a. The very specificity of § 332(c)(7)(B)(iv) "weighs against a finding that Congress has an implicit goal of making preemptive the RF radiation standards for all other types of wireless telecommunications equipment, including wireless telephones." Pet. App. 43a-44a.

Section § 332(c)(7)(B)(iv) marks the extent to which Congress intended FCC regulation of RF radiation to be given preemptive effect. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) (the statute "contains the best evidence of Congress' intent"). By defining its own preemptive reach, that statute "implies that matters beyond that reach are not pre-empted." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992). *See Freightliner Corp. v. Myrick*, 514 U. S. 280, 288 (1995). As *Freightliner* teaches, however, "the presence of an express preemption clause does not by itself entirely foreclose the possibility of implied conflict preemption." *Id.* at 288-89. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000).

Geier holds that the inclusion of an express preemption clause "does not bar the ordinary working of conflict preemption." *Id.*, 529 U. S. at 869; *see Sprietsma*, 537 U.S. at 65. Indeed, in enacting the TCA, Congress must have assumed

that its enactment would have implied effect and would prevail over conflicting state law, in the absence of a clear statement to the contrary. There can be no doubt, however, that Congress has the power to alter the traditional implied preemption analysis and allow state and local laws to operate in place of conflicting federal statutes and regulations. *Geier*, 529 U. S. at 872. Congress exercised that power in the TCA when it included a specific provision (overlooked by the Petition) precluding implied preemption of state and local law:

> *No Implied Effect*—This Act and the amendments made by this Act shall not be construed to modify, impair or supersede Federal, State or local law unless expressly so provided in such Act or amendments.

TCA § 601(c)(1) (note following 47 U.S.C. § 152). The plain meaning of this statutory language requires no interpretation. Any doubt as to the manifest intent of Congress is removed by consulting the legislative history of § 601(c)(1):

> The conference agreement adopts the House provision stating that the bill does not have any effect on any other Federal, *State* or *local* law unless the bill *expressly* so provides. *This provision prevents affected parties from asserting that the bill impliedly preempts other laws.*

H. Conf. Rep. No. 104-458, S. Rep. No. 104-230, 104th Cong., 1st Sess. (1996) at 201 (emphasis added). Thus, § 605(c)(1) of the TCA "specifically provides that the amendments shall not impliedly preempt state or local law." *City of Dallas v. FCC*, 165 F.3d 341, 346 (5th Cir. 1999). *See AT&T Communications of the Pacific Northwest, Inc., v. City of Eugene*, 35 P.3d 1029, 1046 (Or. App. 2001) (the TCA "itself declares that it is not to be interpreted to have implicit preemptive effect").[9]

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[9] Last Term, in construing § 601(c)(1) in another context, this Court indicated that claims that were available under other laws prior to the TCA "continue to be available after its enactment." *City of Rancho Palos Verdes*

5. In examining the issue of conflict preemption, the court of appeals looked to "the presumption against pre-emption of state police power regulations." *Cipollone*, 505 U.S. at 518. See Pet. App. at 34a. As the court of appeals observed, "there is a strong presumption against preemption when the federal government regulates in an area traditionally left to the states, such as health and safety." Pet. App. 41a, quoting *Medtronic, Inc. v. Lohr*, 518 U. S. 470, 485 (1996).

The Petition denies that any such presumption can diminish "conflicts with the federal regulatory regime." Petition, at 22. It invites comparison with cases which did not involve any issue of preemption, *e.g., Chevron U.S.A. Inc. v. NRDC*, 467 U. S. 837 (1984) (presumption not mentioned); *New York v. FERC*, 535 U.S. 1, 18 (2002) ("the question presented does not concern the validity of a conflicting state law or regulation"). The Petition also invokes decisions to the effect that the presumption "is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000) ("Congress has legislated in the field of maritime commerce from the earliest days of the Republic"); cf., *Buckman v. Plaintiff's Legal Comm.*, 531 U. S. 341 (2001).

The Petition's argument is unworthy of certiorari review and was properly rejected. State and local health and safety regulation has been applied to consumer products for decades. Recognizing that most wireless portable devices are "intended for use by consumers, such as hand-held cellular telephones," 47 C. F. R. § 2.1093(d)(5), the FCC did not begin regulating such devices for RF radiation until 1996, having categorically excluded them previously. In 1996, just before the FCC adopted its new regulation, one court found that "Congress has not empowered the FCC to regulate cellular

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v. Abrams, 125 S.Ct. 1453, 1461-62 (Mar. 22, 2005). Under § 601(c)(1), "other laws" include state and local laws.

telephones with regard to health effects and public safety" and that "FCC regulations cannot preempt a state's power on the issue in the instant case, *i.e.*, whether cellular telephones are unsafe and pose an increased health risk to plaintiffs." *Verb v. Motorola, Inc.*, 284 Ill. App.3d 460, 468, 672 N. E.2d 1287, 1293 (1996). Under these circumstances, the Fourth Circuit was justified in assuming as it did that the new FCC regulation was not meant to dislodge the historical police powers of Louisiana in regulating the health and safety aspects of consumer products. *See, e.g., Bates v. Dow Agrosciences*, 125 S. C. 1788, 1801 (Apr. 27, 2005); *Lorillard Tobacco Co. v. Reilly*, 533 U. S. 525, 541-41 (2001) (consumer advertising). *See also* 47 U. S. C. §414.

II. The Fourth Circuit Was Correct In Holding That 47 U.S.C. § 332(C)(3)(A) Does Not Expressly Preempt The State Law Claims At Issue; Its Decision Is Not In Conflict With The Seventh Circuit.

Petitioners challenge the Fourth Circuit's holding that the Louisiana claims do not constitute "entry regulation" within the express preemption clause of 47 U. S. C. § 332(c)(3)(A). Pet. App. 38a-40a. According to the Petition, "the Fourth Circuit badly misread" this provision (at 4), "ignored the plain language and purpose of the statute" (at 25), "ignored congressional intent" (at 28), and "was also plainly wrong" (at 28). All of this criticism hinges entirely upon a truncated extract of the statute, which is all the Petition is willing to reveal. *See* Petition, at 4, 25, 26-27. The Petition fails to quote in full the pertinent text of § 332(c)(3)(A) and *never* mentions the "terms and conditions" clause:

> . . . [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, *except that this paragraph shall not prohibit a*

> *State from regulating the other terms and conditions of commercial mobile services . . . .*

47 U. S. C. § 332(c)(3)(A) (emphasis added).

The Petition asserts that this provision forbids state exercise of "any" authority to regulate entry. Petition, at 25, 26. Literally, that reading is correct. Whether the statute imposes a "flat ban on any form of entry regulation", however, as the Petition contends (at 25), necessarily depends upon the undefined scope of the term, "entry", viewed in the context of the statute as a whole. Although states cannot regulate entry, they "remain free to regulate 'other terms and conditions' of mobile telephone service." *Bastien v. AT&T Wireless Svcs., Inc.*, 205 F.3d 983, 987 (7th Cir. 2000). *See also Cellular Telecomm. Ind. Ass'n. v. FCC*, 168 F.3d 1332, 1335 (D. C. Cir. 1999); *Dakota Systems, Inc. v. Viken*, 2005 SD 27, 694 N. W. 2d, 23, 34 (2005). The legislative history strongly indicates that the statutory phrase, "other terms and conditions", is to be construed broadly:

> . . . By "terms and conditions", the Committee intends to include such matters as customer billing information and practices and billing disputes and *other consumer protection matters*; . . . the bundling of services and equipment and the requirement that carriers make capacity available on a wholesale basis *or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under terms and conditions.*

H. R. Rep. No. 103-111 (1993), at 261 (emphasis added).

When § 332(c)(3)(A) is read in proper context, it is apparent that States may regulate and impose a variety of terms and conditions on services that arguably may have an indirect impact upon entry. Because the Petition fails to discern this "entry"—"conditions of services" dichotomy, the question presented to this Court is an empty enigma: "Whether the

categorical statutory ban on state 'entry' regulation in 47 U.S.C. § 332(c)(3)(A) precludes state law from imposing new RF standards or operational requirements on wireless telephones *as a condition for providing wireless service* within the State." Petition, at i (emphasis added). That question answers itself, because it is clear that the ban on "entry" does *not* preclude state law from imposing conditions for providing wireless services within the State.

The Fourth Circuit concluded that litigation of the Louisiana headset claims would not constitute a "barrier" to entry. Pet. App. 40a. Petitioners complain that the court "improperly engrafted an undefined 'barrier to entry' test on the provision's flat ban on any form of entry regulation" (Petition, at 25), contrary to the plain language of § 332(c)(3)(A). Petition, at 26-27. Any error in that regard, however, was induced by Petitioners. Their appellate brief advised the Fourth Circuit that § 332(c)(3)(A) was enacted in response to concerns that "state regulation was erecting entry *barriers* precluding the rapid development of a national wireless telephone network." C.A. Br. for Appellees, at 52 (emphasis added). The Fourth Circuit understood Petitioners to be arguing that state regulation of wireless telephone specifications would constitute a "barrier" to entry. Pet. App. 38a-39a. In any event, the "barrier" to entry point is purely one of semantics because § 332(c)(3)(A) contemplates that states remain free to impose conditions of service that may impact entry. "Congress did not intend the prohibition of market entry regulation to encompass all barriers or conditions to entry." *Dakota Systems, Inc.*, 694 N.W.2d at 38.[10]

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[10] The Petition asserts that "the panel majority began its examination of § 332(c)(3)(A) applying a presumption against preemption, which tainted the panel majority's entire analysis." Petition, at 25. That simply is not the case, although consideration of the presumption would have been proper. *See* discussion, *supra*, at pp. 24-25. The Fourth Circuit resolved the express preemption issue (Pet. App. 38a-40a) without resort to the

The Petition contends (at 4, 29-30) that the decision below conflicts with the Seventh Circuit's decision in *Bastien*. The *Bastien* decision rested upon a specific finding that "Bastien's complaint directly attacks AT&T Wireless's rates and its right to enter the Chicago market". 205 F.3d at 989. The complaint was construed as directly challenging "the modes and conditions under which AT&T Wireless may *begin* offering service in the Chicago market." *Ibid (emphasis added)*. The Fourth Circuit distinguished *Bastien* on that account. Pet. App. 39a-40a. Moreover, *Bastien* was decided under a standard of review not applicable here. The district court had denied Bastien's motion to remand his case and then granted a Rule 12(b)(6) motion to dismiss his complaint as preempted. On appeal, Bastien appealed the former ruling but not the latter. The actual holding in *Bastien* was that any error in dismissing the complaint had been waived. 205 F.3d at 986. Because denial of remand was the only issue presented for review, the Seventh Circuit declared that it was not bound to accept the truth of the allegations in Bastien's complaint. *Id.*, at 990. In contrast, the Fourth Circuit was reviewing the grant of a Rule 12(b)(6) motion to dismiss and was obliged to assume the truth of the allegations. Those allegations would allow proof that Petitioners are active participants in the market and are providing wireless services. It is not "entry" regulation to subject their post-entry activities to the lawful exercise of police powers and to judicial scrutiny under general law providing remedies for wireless phone consumers.

Because it dealt with a complaint "directly" attacking rates and market entry, *Bastien* stands in a category of its own. The Seventh Circuit recently limited the sweep of *Bastien* in *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1072-73 (7th Cir. 2004). The Petition also ignores a series of FCC declaratory

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presumption, which was discussed elsewhere in its opinion (Pet. App. 34, 41).

rulings recognizing that the indirect effects of state regulatory requirements do not constitute entry regulation:

> Clearly the Texas [universal service contribution] statute is not a direct regulation of entry. Although the contribution requirements arguably indirectly regulate entry by making it more difficult for some carriers to offer service, this is true of many of the requirements that Congress intended to include within "other terms and conditions" of service. Under the circumstances of this case, we do not conclude that these indirect effects render the Texas statute "regulation of entry" within the meaning of Section 332(c)(3).

Petition of Pittencrief Communications, Inc., 13 F.C.C.R. 1735, 1746 (¶ 22) (1997).

The FCC also has ruled that § 332(c)(3)(A) does not generally preempt the award of monetary damages by state courts based on state consumer protection, fraud or contract claims against service providers. *In the Matter of Wireless Consumers Alliance*, 15 F.C.C.R. 17,021, 17,022(¶ 2), 17,026(¶ 9), 17,028(¶ 14), 17,023 (¶ 24) and 17,040 (¶ 37) (2000). Whether a specific award is preempted will depend on the details of the award and the facts and circumstances of a particular case, to be determined in the first instance by a state trial court. *Id.* at 17,022 (¶ 2), 17,037 (¶ 28), 17,040 (¶ 36) and 17,041 (¶ 39). In drawing these conclusions, the FCC observed "that there is no necessary correspondence between the indirect effect that monetary liability may have on a company's behavior and a direct effect that a statute or regulatory rate requirement will have on that behavior." *Id.* at 17,034 (¶ 23). The FCC concluded that a monetary award "would generally fall under the terms and conditions provisions of Section 332, which can be the subject of state action." *Id.*, at 17039 (¶ 36).

The FCC rulings interpreting § 332(c)(3)(A) have enabled courts to allow a wide variety of claims that arise out of mobile wireless services. *See*, e.g., *Fedor*, 355 F.3d at 1074 (class

action for breach of contract); *Union Ink Co., Inc. v. AT&T Corp.*, 352 N. J. Super. 617, 801 A.2d 361 (2002) (class action alleging consumer fraud, common law fraud, and negligent misrepresentation); *Spielholz v. Superior Court*, 86 Cal. App. 4th 1366, 104 Cal. Rptr. 2d 197 (2001) (class action alleging unfair business practices, false advertising, consumer protection violations, misrepresentation, breach of contract, restitution and injunctive relief). Such decisions fit this Court's analyses of express preemption. *See, e.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988) (distinguishing "direct state regulation" from "the incidental regulatory effects" of monetary awards). The interpretation of § 332(c)(3)(A) is not seriously in doubt. The decision below applied the statute correctly and does not give rise to any question substantial enough to warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

RESPONDENTS' APPENDIX

STATUTES AND OTHER PROVISIONS INVOLVED

UNITED STATES PUBLIC LAWS
104th Congress—Second Session

PL 104-104 (S.652)
February 8, 1996

TELECOMMUNICATIONS ACT OF 1996

An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

[...]

SEC. 601. APPLICABILITY OF CONSENT DECREES AND OTHER LAW.

[...]

(c) FEDERAL, STATE, AND LOCAL LAW—

(1) NO IMPLIED EFFECT—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

[...]

SEC. 704. FACILITIES SITING; RADIO FREQUENCY EMISSION STANDARDS.

(a) NATIONAL WIRELESS TELECOMMUNICATIONS SITING POLICY—Section 332(c) (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

'(7) PRESERVATION OF LOCAL ZONING AUTHORITY—

'(A) GENERAL AUTHORITY—Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

'(B) LIMITATIONS—

'(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

'(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

'(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

'(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

'(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless ser-

vice facilities shall be in writing and supported by substantial evidence contained in a written record.

'(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

'(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

'(C) DEFINITIONS—For purposes of this paragraph—

'(i) the term 'personal wireless services' means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

'(ii) the term 'personal wireless service facilities' means facilities for the provision of personal wireless services; and

'(iii) the term 'unlicensed wireless service' means the offering of telecommunications services using duly authorized devices which do not require

individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v)).'.

(b) RADIO FREQUENCY EMISSIONS—Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

(c) AVAILABILITY OF PROPERTY—Within 180 days of the enactment of this Act, the President or his designee shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for the placement of new telecommunications services that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services. These procedures may establish a presumption that requests for the use of property, rights-of-way, and easements by duly authorized providers should be granted absent unavoidable direct conflict with the department or agency's mission, or the current or planned use of the property, rights-of-way, and easements in question. Reasonable fees may be charged to providers of such telecommunications services for use of property, rights-of-way, and easements. The Commission shall provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for such purposes.

[...]

UNITED STATES CODE (2000)

TITLE 21—FOOD AND DRUGS

CHAPTER 9—FEDERAL FOOD, DRUG, AND COSMETIC ACT

SUBCHAPTER VDRUGS AND DEVICES

Part C Electronic Product Radiation Control

[...]

Sec. 360kk. Performance standards for electronic products

(a) Promulgation of regulations

(1) The Secretary shall by regulation prescribe performance standards for electronic products to control the emission of electronic product radiation from such products if he determines that such standards are necessary for the protection of the public health and safety. Such standards may include provisions for the testing of such products and the measurement of their electronic product radiation emissions, may require the attachment of warning signs and labels, and may require the provision of instructions for the installation, operation, and use of such products. Such standards may be prescribed from time to time whenever such determinations are made, but the first of such standards shall be prescribed prior to January 1, 1970. In the development of such standards, the Secretary shall consult with Federal and State departments and agencies having related responsibilities or interests and with appropriate professional organizations and interested persons, including representatives of industries and labor organizations which would be affected by such standards, and shall give consideration to—

(A) the latest available scientific and medical data in the field of electronic product radiation;

(B) the standards currently recommended by (i) other Federal agencies having responsibilities relating to the

control and measurement of electronic product radiation, and (ii) public or private groups having an expertise in the field of electronic product radiation;

(C) the reasonableness and technical feasibility of such standards as applied to a particular electronic product;

(D) the adaptability of such standards to the need for uniformity and reliability of testing and measuring procedures and equipment; and

(E) in the case of a component, or accessory described in paragraph (2)(B) of section 360hh of this title, the performance of such article in the manufactured or assembled product for which it is designed.

(2) The Secretary may prescribe different and individual performance standards, to the extent appropriate and feasible, for different electronic products so as to recognize their different operating characteristics and uses.

(3) The performance standards prescribed under this section shall not apply to any electronic product which is intended solely for export if (A) such product and the outside of any shipping container used in the export of such product are labeled or tagged to show that such product is intended for export, and (B) such product meets all the applicable requirements of the country to which such product is intended for export.

(4) The Secretary may by regulation amend or revoke any performance standard prescribed under this section.

(5) The Secretary may exempt from the provisions of this section any electronic product intended for use by departments or agencies of the United States provided such department or agency has prescribed procurement specifications governing emissions of electronic product radiation and provided further that such product is of a type used solely or

predominantly by departments or agencies of the United States.

(b) Administrative procedure

The provisions of subchapter II of chapter 5 of title 5 (relating to the administrative procedure for rulemaking), and of chapter 7 of title 5 (relating to judicial review), shall apply with respect to any regulation prescribing, amending, or revoking any standard prescribed under this section.

[...]

Sec. 360ss. State standards

Whenever any standard prescribed pursuant to section 360kk of this title with respect to an aspect of performance of an electronic product is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, any standard which is applicable to the same aspect of performance of such product and which is not identical to the Federal standard. Nothing in this part shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a requirement with respect to emission of radiation from electronic products procured for its own use if such requirement imposes a more restrictive standard than that required to comply with the otherwise applicable Federal standard.

[...]

TITLE 42—THE PUBLIC HEALTH AND WELFARE

CHAPTER 55—NATIONAL ENVIRONMENTAL POLICY

§ 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

§ 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential

considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible:

(1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and

(2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.

Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

> (D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:
>
> > (i) the State agency or official has statewide jurisdiction and has the responsibility for such action,
> >
> > (ii) the responsible Federal official furnishes guidance and participates in such preparation,
> >
> > (iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and
> >
> > (iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other

responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

[...]

CODE OF FEDERAL REGULATIONS (2000)

TITLE 47—TELECOMMUNICATION

CHAPTER I—FEDERAL COMMUNICATIONS COMMISSION

PART 1—PRACTICE AND PROCEDURE

Subpart I. Procedures Implementing the National Environmental Policy Act of 1969

[...]

Sec. 1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

[...]

(e) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the regulations contained in this chapter concerning the environmental effects of such emissions. For purposes of this paragraph:

(1) The term personal wireless service means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(2) The term personal wireless service facilities means facilities for the provision of personal wireless services;

(3) The term unlicensed wireless services means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services; and

(4) The term direct-to-home satellite services means the distribution or broadcasting of programming or

services by satellite directly to the subscriber's premises without the use of ground receiving or distribution equipment, except at the subscriber's premises or in the uplink process to the satellite

[...]

LOUISIANA CIVIL CODE (West, 2003)

Book III—Modes of Acquiring Ownership of Things

Title VII—Sale

Chapter 9. Redhibition

Art. 2520. Warranty against redhibitory defects

The seller warrants the buyer against redhibitory defects, or vices, in the thing sold.

A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. The existence of such a defect gives the buyer the right to obtain rescission of the sale.

A defect is redhibitory also when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a buyer would still have bought it but for a lesser price. The existence of such a defect limits the right of a buyer to a reduction of the price.

[...]

Art. 2522. Notice of existence of defect

The buyer must give the seller notice of the existence of a redhibitory defect in the thing sold. That notice must be sufficiently timely as to allow the seller the opportunity to make the required repairs. A buyer who fails to give that notice suffers diminution of the warranty to the extent the seller can show that the defect could have been repaired or that such repairs would have been less burdensome, had he received timely notice.

Such notice is not required when the seller has actual knowledge of the existence of a redhibitory defect in the thing sold.

[...]

Art. 2531. Liability of seller who knew not of the defect

A seller who did not know that the thing he sold had a defect is only bound to repair, remedy, or correct the defect. If he is unable or fails so to do, he is bound to return the price to buyer with interest from the time is was paid, and to reimburse him for the reasonable expenses occasioned by the sale, as well as those incurred for the preservation of the thing, less the credit to which the seller is entitled if the use made of the thing, or the fruits it has yielded, were of some value to the buyer.

A seller who is held liable for a redhibitory defect has an action against the manufacturer of the defective thing, if the defect existed at the time the thing was delivered by the manufacturer to the seller, for any loss the seller sustained because of the redhibition. Any contractual provision that attempts to limit, diminish or prevent such recovery by a seller against the manufacturer shall have no effect.

[...]

Supreme Court, U.S.
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(4)

No. 05-198

In the Supreme Court of the United States

NOKIA INC., ET AL.,

Petitioners,

v.

GARRETT NAQUIN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000) 14, 15

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit corporation with 129 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of a wide array of products and services. A list of PLAC's current corporate membership is included in an appendix to this brief.

PLAC's primary purpose is to file *amicus curiae* briefs in cases raising issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted hundreds of *amicus* briefs in the state and federal appellate courts, and has participated in many of this Court's cases involving issues of federal preemption. See, *e.g.*, *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000); *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344 (2000); *United States* v. *Locke*, 529 U.S. 89 (2000). Because many of PLAC's members manufacture products that are subject to preemptive federal requirements, they have a vital interest in the development of the law of preemption and the proper resolution of this case.

STATEMENT

1. Since the advent of commercial radio communications in the United States (used first in wireless telegraphy and then in radio audio transmissions), the federal government has exercised regulatory authority over the new medium. See *NBC* v.

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[1] Letters of consent by the parties to the submission of this brief have been filed with the Clerk's office. Pursuant to Rule 37.6 of the Rules of this Court, PLAC states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

United States, 319 U.S. 190, 210-12 (1943). As petitioners show (Pet. 5-8), federal regulation of all forms of interstate communication by radio has been – and remains today – plenary and comprehensive.

To preserve the national government's exclusive authority in this field, Congress has enacted a number of provisions expressly preempting state and local authority. One such provision instructs that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3). Congress has also conferred sweeping regulatory powers upon the FCC to regulate radio communications. See, *e.g.*, *id.* §§ 301, 303. Pursuant to that authority, the FCC has issued detailed regulations governing radio frequency ("RF") emissions from cell phones. See, *e.g.*, 47 C.F.R. §§ 1.1307(b), 2.1093(d), 2.803(a). Among other things, the FCC has concluded that there are no known risks from exposure to RF emissions from wireless phones that comply with FCC standards and, accordingly, public safety would not be promoted by requiring headsets to be used or provided with such phones. See Pet. 24. It is "imperative," the FCC has stated, that the States not be allowed to impose "additional requirements" that "could conflict with [federal] standards and frustrate" the uniform "federal scheme for the provision of nationwide cellular service." *Use of the Bands 825-845 MHZ and 870-890 MHZ*, 89 FCC 2d 58, 95 ¶ 81 (1982).

2. This case arises out of five class actions brought by past and future purchasers of cell phones against virtually the entire wireless industry. In the one implicated by the petition for certiorari (see Pet. 1 n.1, 12-13, 15 n.3), a class of Louisiana residents who were not provided headsets with their cell phones and who have not been diagnosed with certain diseases brought suit against multiple cell phone manufacturers and service providers. See Pet. App. 53a-56a & n.4.

In essence, plaintiffs (respondents here) contended that the cell phones provided to them without a headset are unreasonably dangerous because they emit unsafe levels of RF radiation. Respondents advanced a wide array of state-law claims, includ-

ing strict products liability, negligent misrepresentation, breach of implied warranty, and other tort claims. In addition to seeking a determination that their FCC-compliant cell phones were unreasonably dangerous when used without headsets, respondents requested various forms of relief, including compensatory damages for the cost of purchasing the missing headsets, punitive damages, attorneys' fees, an injunction requiring the defendants (petitioners here) to provide cell phones that are compatible with headsets, and an injunction requiring petitioners to provide instructions on the use of headsets as well as warnings about using cell phones without headsets.

3. The district court granted petitioners' motion to dismiss on grounds of federal preemption. Pet. App. 51a-76a. It ruled that respondents' claims were impliedly preempted because they conflict with the judgment reached by the FCC concerning safe levels of RF emissions and frustrate "Congress's objective[] of achieving national uniformity in wireless telecommunications services." *Id.* at 65a. In analyzing the issue of implied preemption, the district court declined to apply a "presumption against preemption." *Id.* at 62a-63a. "That presumption is not triggered," the court explained, "when the state claim falls in an area 'where there has been a history of significant federal presence.'" *Id.* at 63a (quoting *United States* v. *Locke*, 529 U.S. 89, 108 (2000)). "Congressional concern for national uniformity of regulation in the field of wireless telecommunications," the court reasoned, "has been clear since the inception of commercial wireless telephone service." *Ibid.* Beyond that, the court explained, "these lawsuits do not involve a traditional claim of compensation for personal injury" where such a presumption might be appropriate (since the plaintiff class "excludes those who have developed" illness and makes "no request for personal injury compensation"). *Ibid.*

4. A divided panel of the Fourth Circuit reversed. Pet. App. 1a-50a. The majority first disagreed with the district court's conclusion "that the presumption against preemption does not apply here." *Id.* at 34 n.4. The lower court's reliance on *Locke*, which involved preemption of the State of Washington's oil

tanker regulations, was "misplaced," the court of appeals said, "because there is not the same federal presence in the wireless telecommunications area as there is in the area of maritime commerce." Pet. App. 35 n.4. Moreover, the majority reasoned, "[t]he presumption against preemption is even stronger" when "state remedies, like tort remedies," are implicated and "no federal remedy exists." *Ibid.* (internal quotations omitted). Applying this "strong" presumption against preemption (*id.* at 41a), the panel rejected petitioners' arguments for both express and implied preemption. *Id.* at 35a-45a.

INTRODUCTION AND SUMMARY OF ARGUMENT

As petitioners demonstrate, this case satisfies all of the traditional criteria of certworthiness. The Fourth Circuit's decision conflicts with the decisions of other circuits and this Court; it is seriously mistaken; and, if permitted to stand, it will subvert the uniform national regulatory scheme governing wireless communications by allowing judges and lay juries applying state law to second-guess the FCC's judgment about the appropriate level of RF emissions in cellular telephones.

Although those are reasons enough to grant the petition, there is an additional reason why further review is warranted. This case offers an ideal vehicle for clarifying – and reexamining – an important and recurring issue in every preemption case as to which the lower courts are divided: the so-called "presumption" against preemption. See Pet. 26 n.6. This Court should grant review not only to address the confusion in the lower courts over the presumption, but also to reexamine a doctrine whose legitimacy has been the subject, in recent years, of persuasive criticism by judges and legal scholars.

I. The panel majority in the Fourth Circuit disagreed with the district court over whether the presumption against preemption is applicable to this case. In the district court's view, this case falls within a recognized exception to the presumption because there has been a "'history of significant federal presence'" in regulating "commercial wireless telephone service."

Pet. App. 63a (quoting *United States* v. *Locke*, 529 U.S. 89, 108 (2000)). Applying a different conception of how to measure a "significant federal presence," the Fourth Circuit reached the opposite conclusion, applied the presumption, rejected petitioners' preemption defense, and reversed.

The Fourth Circuit's interpretation of the *Locke* exception is symptomatic of – and compounds – the conflicts and confusion in the lower courts concerning what the presumption against preemption means and when it applies. The circuits have taken different approaches, for example, to determining when a history of federal regulation qualifies as "significant" and how to define the relevant regulatory "field" in the first place. Applying those divergent approaches, the courts of appeals have also reached conflicting conclusions about whether particular "fields" are covered by the presumption. Beyond that, the Fourth Circuit's suggestion that the presumption comes in an "extra-strength" form is wrong and would "further complicat[e]" principles of preemption law that are "already * * * difficult to apply." *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 873 (2000). Equally mistaken – and inconsistent with this Court's teaching in *Aetna Health Inc.* v. *Davila*, 124 S. Ct. 2488 (2004), and *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) – is the Fourth Circuit's suggestion that the presumption applies merely because some "state remedies" would be unavailable if the preemption defense were accepted.

II. Review is also warranted to reexamine the presumption against preemption in light of persuasive criticisms leveled in recent years by judges, legal scholars, and prominent practitioners. In addition to the confusion over the presumption's application in the lower courts, recent scholarship and commentary has challenged the assumption – reflected but not explained in some of this Court's opinions – that the presumption finds support in the Constitution's text or structure and in traditional principles of federalism. Scholars have demonstrated that, far from having deep roots in our legal traditions, the presumption was not mentioned in this Court's earliest preemption decisions; it was recognized for the first time in the 1920s and 1930s; and,

in the decade before its creation, this Court applied the opposite presumption (*in favor of* preemption). Still other scholars have suggested, based on historical materials and arguments this Court has never considered, that the presumption should be rejected because it is inconsistent with the text of the Supremacy Clause as that provision would have been understood by eighteenth-century judges. Finally, this Court should take this occasion to reexamine the presumption because it is inconsistent in theory and application with other settled features of preemption law and canons of statutory interpretation.

ARGUMENT

I. This Case Presents An Invaluable Opportunity To Correct Deep Confusion In The Circuits Regarding The Applicability And Meaning Of The Presumption Against Preemption

In *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), the Court explained that, when Congress "legislate[s] in a field which the States have traditionally occupied," courts should "start with the assumption that the historic police powers of the States were not superseded by the Federal Act unless that was the clear and manifest purpose of Congress." In more recent cases, that starting "assumption" has evolved into a "presumption" disfavoring preemption. See, *e.g.*, *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001); *United States* v. *Locke*, 529 U.S. 89, 108 (2000); *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 518 (1992).

The Court has also recognized an exception to this presumption. In *Locke*, the Court observed that the passage quoted above from *Rice* was "followed by extensive and careful qualifications" and declined to apply the "artificial" presumption against preemption to the question whether Washington State's oil tanker regulations were preempted by federal law. 529 U.S. at 107. No such presumption "is triggered," Justice Kennedy's opinion for the Court explained, "when [a] State regulates in an area where there has been a history of significant federal presence." *Id.* at 108. Because the Washington tanker

regulations involved "interstate navigation" and "maritime trade" – areas "where the federal interest has been manifest since the beginning of our Republic" and Congress has "creat[ed] an extensive federal statutory and regulatory scheme" – the presumption against preemption was inapplicable. *Id.* at 99, 108; see also *Buckman*, 531 U.S. at 347, 353 (declining to apply presumption because "[p]olicing fraud against federal agencies" is "hardly" an area of traditional state authority and because plaintiffs' "fraud-on-the-agency" claims did not rely on "traditional state tort law").

In this case, the panel majority and the district court sharply disagreed over the meaning and applicability of the *Locke* exception. In the district court's view, this case fell squarely within the *Locke* exception because "[c]ongressional concern for national uniformity of regulation in the field of wireless telecommunications has been clear since the inception of commercial wireless telephone service." Pet. App. 63a. For that reason, and because "these lawsuits do not involve a traditional claim of compensation for personal injury" (*ibid.*), the district court refused to apply any presumption against preemption. In contrast, the panel not only held that the *Locke* exception was inapposite but also applied a "strong" variant of the presumption. *Id.* at 34 n.4, 41. The district court was wrong to rely on *Locke*, the Fourth Circuit reasoned, "because there is not the same federal presence in the wireless telecommunications area as there is in the area of maritime commerce." Pet. App. 35 n.4. A "strong" version of the presumption against preemption must be applied, the Fourth Circuit added, because the case implicated "state remedies, like tort remedies," and "no federal remedy exists." *Ibid.* (internal quotations omitted).

This case illustrates the great difficulty the lower courts have had in applying the presumption against preemption and the exception recognized in *Locke*. Indeed, as we next explain, the Fourth Circuit's analysis raises at least four questions about the meaning of the presumption and the *Locke* exception.

1. *When is a history of federal presence sufficiently "significant" to trigger the exception?* The lower courts have

had difficulty determining when a history of federal regulation attains the level of significance required to escape the presumption against preemption. At least in theory, the federal government's regulatory role could be evaluated quantitatively (how long?), qualitatively (how extensive?), or in both ways. In addition, the quantitative measurement could be viewed in absolute terms (how many years?) or in relative terms (how long in relation to either the federal government's lifespan or the age of the regulated technology?).

The district court in this case took the eminently sensible view that the duration of the federal government's involvement should be measured relative to the underlying technology being regulated. Accordingly, the district court emphasized that Congress's "concern for national uniformity of regulation in the field of wireless telecommunications has been clear *since the inception of commercial wireless telephone service*." Pet. App. 63a (emphasis added). The Fourth Circuit, however, took a different approach to measuring the federal government's historical role, concluding that "there is not *the same federal presence* in the wireless telecommunications area as there is in the area of maritime commerce." *Id.* at 35a n.4 (emphasis added). To the extent that the Fourth Circuit was relying on how long the federal government has regulated the underlying subject matter (wireless telecommunications) in comparison to the government's existence, its reasoning suffers from a glaring flaw. It should be obvious why federal regulation of cell phones is of more recent origin than regulation of seagoing ships: radio communications and cell phones are only a hundred years old and thirty years old, respectively, whereas commercial shipping predates the founding of the Republic. It is simply illogical to compare the proportion of the federal government's lifespan that has been spent regulating cell phones with the proportion spent regulating shipping.

There is another problem with the Fourth Circuit's simplistic comparison to the duration of federal regulation of "maritime commerce" in *Locke*. In *Locke*, this Court gave no hint that the necessary "history of significant federal presence" must rival

that of maritime commerce before the presumption against preemption will be avoided. By viewing maritime-like federal regulation as *necessary* to trigger the *Locke* exception, rather than as merely *sufficient* in that case to do so, the Fourth Circuit misunderstood the teachings of *Locke*. See also Pet. 25-26.[2]

The Fourth Circuit's approach to *Locke* conflicts with *Ting* v. *AT&T*, 319 F.3d 1126 (9th Cir.), cert. denied, 540 U.S. 811 (2003). There, the question was whether a California consumer-protection law was preempted by the Communications Act of 1934, the same statute implicated in this case. The Ninth Circuit concluded that "the long history of federal presence in regulating long-distance telecommunications" brought the case within the *Locke* exception (*id.* at 1136), making clear that – unlike the Fourth Circuit – it thought a 70-year "history of significant federal presence" was sufficient to vitiate any presumption against preemption. See also *Maier* v. *FCC*, 735 F.2d 220, 224 (7th Cir. 1984) (noting that Communications Act "provided a comprehensive scheme of federal regulation of * * * radio communication"). The Court should grant review if for no other reason than to resolve the conflict between the Fourth and Ninth Circuits over the meaning of the *Locke* exception and whether it covers the important area of interstate telecommunications by wire or radio.

Under the Fourth Circuit's view, even if federal regulations have governed a recently developed technology since its introduction, state laws that intrude on the federal regulatory structure might nevertheless enjoy a presumption against preemption merely because the tradition of federal regulation of the innovative technology is "not the same" as that over maritime commerce. For example, any effort by the FCC to regulate satellite radio through rules that preempt state and local law would face an extra hurdle and have to overcome a "presumption" before they would be given the effect desired by the agency. The

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[2] As petitioners note (Pet. 25-26), even if measured in absolute terms the federal government's comprehensive regulation of wireless communications actually *predates* the maritime statutes that were at issue in *Locke*.

Court should take this opportunity to clarify that the *Locke* exception does not require that federal regulation have been "manifest since the beginning of our Republic" (529 U.S. at 99), and that the proper frame of reference is not absolute, but relative, to the history of the technology or field of law.

2. *At what level of generality should the relevant "field" of federal regulation be defined?* In *Locke*, this Court explained that the presumption against preemption will not apply "when the State regulates in an *area* where there has been a history of significant federal presence." 529 U.S. at 108 (emphasis added). This Court did not, however, provide guidance on how courts should go about identifying the relevant "area" of regulation. The lower courts have struggled with that threshold question.

This case provides a good example of the need for clarification. Is the proper field of regulatory activity in this case (as the district court believed, see Pet. App. 63a (emphasis added)) "*commercial* wireless telephone service"? Is it "wireless telecommunications" generally, as the Fourth Circuit appeared to believe? *Id.* at 35 n.4. Alternatively, should the lower courts have confined themselves to the narrower field of technical standards for wireless service, which, as the district court noted (*id.* at 67a), has been an exclusively federal province? The threshold definition a reviewing court selects will drive the analysis and, in many cases, determine whether or not the *Locke* exception applies.

The lack of guidance from this Court on this issue has contributed to conflicting results in the lower courts. For example, in *Union Pacific Railroad* v. *California Public Utilities Comm'n*, 346 F.3d 851 (2003), cert. denied, 540 U.S. 1104 (2004), the Ninth Circuit held that the *Locke* exception does not apply to state laws regulating railroad safety, because the Federal Railroad Safety Act was passed only in 1970 and, "[p]rior to that time," "*railroad safety* was largely regulated by the states." *Id.* at 858, 864 n.17 (emphasis added). In contrast, the D.C. Circuit in *CSX Transportation, Inc.* v. *Williams*, 406 F.3d 667 (2005), held that the *Locke* exception *does* apply to railroad safety laws, observing that "just as Congress has

regulated ships and vessels since the beginning of the Republic," it has long regulated "our Nation's rail system." *Id.* at 673 (quoting *CSX Transp., Inc.* v. *City of Plymouth*, 92 F. Supp. 2d 643, 648 (E.D. Mich. 2000)). These conflicting results are at least partly traceable to disagreements over the proper level of generality at which the *Locke* inquiry should be conducted.

To dispel this confusion, this Court's guidance is needed. Defining the relevant field of federal regulation too narrowly risks making the *Locke* exception an irrelevance, because, with the ever-increasing rate of technological complexity and innovation, litigants frequently will be able to distinguish a new product, technology, or field from one that has come before (thus rendering legally irrelevant any prior history of federal regulation). Conversely, if courts define the area broadly, it will usually be possible to point to some prior federal laws or regulations that could trigger the *Locke* exception. Only this Court can eliminate the confusion in the lower courts about how *Locke* should be understood and applied. See also Pet. 26 n.6.[3]

3. *Is there a "strong" version of the presumption against presumption – and of the* Locke *exception?* The Fourth Circuit not only declined to apply the *Locke* exception but also applied an especially "strong" version of the presumption against preemption because "no federal remedy exists." Pet. App. 35 n.4 (internal quotations omitted). In stark contrast, the D.C. Circuit has suggested, in *CSX Transportation, Inc.* v. *Williams*, *supra*, that if the *Locke* exception applies it is the argument *for* pre-

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[3] This Court faced a very similar problem – and need to give the lower courts guidance – in its cases involving qualified immunity. In those cases, the critical issue is whether a government official's conduct violated a right that was "clearly established" at the time the conduct occurred. *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987). But "[t]he operation of this standard * * * depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Id.* at 639. In recent years, this Court has taken a series of cases in order to make that point as well as to clarify for the lower courts how the qualified immunity analysis must be conducted. See, *e.g.*, *Groh* v. *Ramierz*, 540 U.S. 551 (2004); *Hope* v. *Pelzer*, 536 U.S. 730 (2002).

emption – not the presumption *against* – that must be treated as "particularly strong." 406 F.3d at 673.

The Fourth Circuit's suggestion that the presumption against preemption comes in both regular and super strengths is mistaken. The only authority the court cited – its prior decision in *Abbot* v. *American Cyanamid Co.*, 844 F.2d 1108, 1112 (4th Cir.), cert. denied, 488 U.S. 908 (1988) – purported to draw that principle from *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 250-51 (1984). But, as this Court has since made clear, *Silkwood* does not stand for any such broad principle; rather, it turned on "specific evidence" of Congress's intent to preserve state-law remedies under the Price Anderson Act and other statutes relating to nuclear power plants. *Buckman*, 531 U.S. at 351-52.

In contrast, the D.C. Circuit's suggestion that courts should approach some cases with a presumption *in favor of* preemption *does* find substantial support in this Court's decisions. The Court has long applied that rule where Congress has legislated in an area of "dominant" federal interests. For example, in *Hines* v. *Davidowitz*, 312 U.S. 52 (1941), the Court held that the Alien Registration Act of 1940, embodying a comprehensive federal system of alien registration, preempted a Pennsylvania law regulating the same subject. Given the uniquely national nature of "the general field of foreign affairs, including power over immigration," the Court explained, state authority to act concurrently in this area must be "restricted to [its] narrowest limits." *Id.* at 68. At the same time, however, this competing presumption *in favor of* preemption typically is not combined with the *Locke* exception. Whether or not such a combination is appropriate, these circuit decisions further underscore the need for clarification by this Court.

4. *When do state-law "remedies" and claims grounded in tort law fall within a traditional area of state authority?* This Court's decisions in *Buckman* and in *Aetna Health Inc.* v. *Davila*, 124 S. Ct. 2488 (2004), make clear that not every lawsuit advancing claims nominally based on state tort law falls within an area of traditional state authority. In *Buckman*, this

Court pointedly contrasted the plaintiffs' novel "fraud-on-the-FDA claims" with "traditional state law tort principles." 531 U.S. at 352; accord *id.* at 353. Following this Court's lead, the district court declined to apply the presumption against preemption in part because respondents' lawsuit "do[es] not involve a traditional claim of compensation for personal injury" (but is rather, at bottom, a challenge to the FCC's judgment that headsets are unnecessary, dressed up in the garb of a tort lawsuit). Pet. App. 63a. The Fourth Circuit, however, ignored this consideration and even suggested that the presumption should apply to any case where "state remedies, like tort remedies," might be preempted. *Id.* at 35a n.4.

But this Court has never suggested that any case involving state "remedies" is subject to the anti-preemption presumption, and the Fourth Circuit's refusal to look behind the labels to the true nature of respondents' tort claims simply ignores *Buckman*'s teachings. Likewise, in *Davila*, the Fifth Circuit had pointed out that the preemptive federal statute (ERISA) did not furnish tort-type remedies and held that the plaintiffs' pursuit of such remedies under state law was a reason to hold their claims not preempted. This Court unanimously rejected that reasoning as "erroneous" (124 S. Ct. at 2498), explaining that a federal decision *not* to provide a tort remedy can itself have strong preemptive effect. The Fourth Circuit's decision is inconsistent with *Davila* as well as *Buckman*.

II. The Court Should Take This Opportunity To Reexamine The Presumption Against Preemption

In recent years, the "presumption against preemption" has come under attack from a variety of judges, legal scholars, and prominent practitioners. These critics have challenged the presumption's historical pedigree, its logical compatibility with the rest of preemption law, its consistency with the text of the Supremacy Clause, and its validity in light of the Constitution's structure. This Court has not yet considered most of these potent criticisms. The Court should use this case to conduct such a reexamination.

1. Some Members of this Court have suggested, without elaboration, that the presumption against preemption is rooted in fundamental principles of federalism embodied in the Constitution. See, *e.g.*, *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 533 & n.1 (1992) (Blackmun, J., concurring). In recent years, however, that view has been persuasively challenged by legal scholars and prominent practitioners. For example, Professor Viet Dinh has argued that, "[c]ontrary to the prevailing wisdom and the unexplored assumptions of Supreme Court dicta, the constitutional structure of federalism does *not* admit to a general presumption against federal preemption of state law." Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2087 (2000) (emphasis added). Solicitor General Paul Clement has advanced the same argument, see Clement & Dinh, *When Uncle Sam Steps In*, LEGAL TIMES, June 19, 2000, at 66, as has Professor Jack Goldsmith. See Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 S. CT. REV. 175, 182 (presumption is "difficult to justify" on constitutional grounds).

As these commentators have explained, the presumption against preemption finds no support in the text or the structure of the Constitution. The text doesn't support it because the Supremacy Clause *displaces* state authority, in marked contrast to other provisions that serve as the basis for other clear-statement rules (such as the Tenth and Eleventh Amendments, which explicitly *preserve* state power). Nor can support for the presumption be derived from the Constitution's structure:

> The question in pre-emption cases is not whether Congress has the authority to enact a law, but simply whether federal legislation ought to be exclusive. Thus a presumption *against* pre-emption would not be a presumption against federal laws in areas of traditional state concern, but rather a presumption *in favor of overlapping and potentially conflicting regulations* at federal, state, and local levels. Nothing in the Constitution indicates any particular solicitude for federal laws that duplicate state laws without displacing them.

Clement & Dinh, *supra*, at 66 (emphasis added).

Drawing on the history of the Constitutional Convention, scholars have argued persuasively that Congress's power to preempt derives from the enumerated powers in Article I, Section 8, including the Necessary and Proper Clause, rather than from the Supremacy Clause in Article VI. See Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 803-07 (1996); Dinh, *supra*, 88 GEO. L.J. at 2088. Under this view, the Supremacy Clause is properly regarded as a "constitutional choice of law rule, one that gives federal law precedence over conflicting state law" – but one that comes into play "only at the post-enactment stage, where a state law conflicts to some degree with a federal law." Dinh, *supra*, 88 GEO. L.J. at 2090; accord Gardbaum, *supra*, 74 TEX. L. REV. at 804. "Given this constitutional structure," Professor Dinh explains, "questions of constitutional policy in preemption * * * were answered by the framers with the specific enumerations and limitations of federal legislative power in Article I." Dinh, *supra*, 88 GEO. L.J. at 2092. Thus, when Congress has enacted legislation that is

> consistent with its limited, enumerated powers, the question ceases to be one about the vertical distribution of powers between federal and state governments – after all, the Constitution gave Congress the power to legislate, and Congress has exercised that power. Rather, the question becomes one of horizontal division of federal governmental functions among the three branches. Specifically, the task for the Court is to discern what Congress has legislated and whether such legislation displaces concurrent state law – in short, the task of statutory construction. If, in performing this task, the Court were to systematically favor one result over another, it would disrupt the constitutional division of power between federal and state governments, rewrite the laws enacted by Congress, or both. Such actions * * * risk an illegitimate expansion of the judicial function.

Ibid. Accordingly, constitutional structure strongly suggests that "there should be no general systematic presumption against or in favor of preemption." *Ibid.*

2. Professor Caleb Nelson of the University of Virginia Law School has reached the same conclusion by a different route. Relying on a detailed analysis of long-overlooked historical materials, Professor Nelson has shown that the presumption against preemption *is contrary to the text of the Supremacy Clause*. See Nelson, *Preemption*, 86 VA. L. REV. 225, 235-64, 292-93 (2000). According to Professor Nelson,

> The final phrase in the Supremacy Clause – "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" – is a "non obstante" clause. Although such clauses are no longer familiar to us, legal draftsmen in late eighteenth-century America used them to acknowledge that a statute might contradict some other laws and to instruct courts *not* to apply the traditional presumption against implied repeals. When a statute contained a non obstante clause, courts did not have to struggle to harmonize the statute with prior laws; they could give the statute *its natural meaning* and let it displace whatever law it contradicted.
>
> The presence of a non obstante provision in the Supremacy Clause * * * establishes an important rule of construction. The non obstante provision tells courts that even if a particular interpretation of a federal statute would contradict (and therefore preempt) some state laws, this fact is not automatically reason to prefer a different interpretation. It follows that courts should *not* automatically seek "narrowing" constructions of federal statutes solely to avoid preemption.

Id. at 232 (emphasis added; footnote omitted); see also Goldsmith, *supra*, 2000 S. CT. REV. at 184 (agreeing with Nelson that "the Supremacy Clause's non obstante clause * * * was designed precisely to eliminate any residual presumption").

This Court has not yet considered Professor Nelson's compelling criticism of the presumption against preemption based on the text of the Supremacy Clause. Cf. *Geier* v. *American*

Honda Motor Co., 529 U.S. 861, 908 n.22 (2000) (dissenting opinion) (alluding to argument but declining to address it).[4]

3. Other recent scholarship has refuted the assumption that the "presumption against preemption" is deeply rooted in the Nation's history or in principles of federalism. This Court's earliest preemption cases make no mention of any such presumption. See, *e.g.*, *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824); *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 343-44 (1816); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796). In fact, the presumption (or "assumption") was not recognized by this Court until the 1920s and 1930s. See Davis, *Unmasking The Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 973-83 (2002); Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 785-808 (1994).

What is more, in the first several decades of the twentieth century this Court recognized a strong generalized presumption *in favor of* preemption. Thus, the preemption doctrine

> has evolved * * * from one based on an assumption of congressional legislative exclusivity and almost certain preemption of state regulation to a doctrine, in the mid-part of the century, based on a search for congressional intent to preempt so that state laws, particularly those based on historical police powers, would not be needlessly displaced.

Davis, *supra*, 53 S.C. L. REV. at 971. Accord Gardbaum, *supra*, 79 CORNELL L. REV. at 801-08.

The Court's "official shift from automatic preemption to an intent-based test during the 1930s," Professor Gardbaum explains, was closely tied to "the enlargement of the commerce power" during this time period, and originated in the concern that without such a shift Congress's expanded powers "would otherwise have threatened to preempt too much state power."

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[4] Professor Nelson's article also contends, based on a separate line of argumentation and separate grounds, that this Court should abandon obstacle preemption. PLAC disagrees with that contention, as did this Court in *Geier*.

Gardbaum, *supra*, 79 CORNELL L. REV. at 808. Although that practical concern may well justify the abandonment of a generalized presumption in favor of preemption whenever *any* federal law exists, it hardly supports the use of a presumption against preemption in the form adopted in *Cipollone* – as a rule that all express preemption clauses must be narrowly construed.

This recent scholarship undercuts any suggestion that the presumption against preemption has deep historical roots in our legal traditions or in the federalism principles animating the Constitution. Instead, the presumption is of relatively recent origin; it was preceded by a contrary presumption favoring preemption; and it was developed out of pragmatic concerns that do not justify its current function.[5]

4. The presumption against preemption is also difficult to reconcile with other, well-settled principles of preemption law and statutory interpretation. It is at odds logically, for example, with the universally acknowledged principle that "[p]re-emption fundamentally is a question of congressional intent." *English* v. *General Elec. Co.*, 496 U.S. 72, 78-79 (1990). If preemption turns on what Congress intends, it is difficult to see why an inquiry into intent should be systematically distorted by a threshold assumption. Two Members of this Court have strenuously objected, on precisely this ground, to the use of the presumption in cases involving express preemption. See *Cipollone*, 505 U.S. at 544 (Scalia, J., joined by Thomas, J., concurring in the judgment in part and dissenting in part) (Court's "job is to interpret Congress' decrees of pre-emption neither narrowly nor broadly, but in accordance with their

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[5] Professor Goldsmith has also shown that the presumption against preemption cannot sensibly be justified based on a prediction about how Congress "usually" acts, or on the need to provide "notice" to the States (because "*any* default rule will put the states on notice as long as the rule is clear"), or on the ground that it safeguards the political checks of federalism against judicial usurpation (because erroneous judicial decisions *denying* preemption are no less of an affront to the will of the political branches). Goldsmith, *supra*, 2000 S. CT. REV. at 183-87 (emphasis added).

apparent meaning"). Nor is it easy to see why it would make sense, under a "purpose-based" approach to statutory interpretation, for courts automatically to presume that a "reasonable member of Congress" intended either no preemption, or only limited preemption, where Congress *itself* has chosen to include an express preemption clause in a statute. S. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 88, 97-101 (2005); *id.* at 99 (criticizing excessive reliance on "canons" as obscuring Congress's true purpose).[6]

The presumption against preemption also coexists uneasily with the settled principle that the importance of a State's interest underlying a law that is allegedly preempted is *irrelevant* to the preemption analysis. See, *e.g.*, *Fidelity Federal Savings and Loan Ass'n.* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) ("These principles [governing preemption] are not inapplicable here simply because real property law is a matter of special concern to the States: 'The relative importance to the State of its own law is *not material* when there is a conflict with a valid federal law.'") (emphasis added) (quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962)); *DeCanas* v. *Bica*, 424 U.S. 351, 357 (1976) ("[E]ven state regulation designed to protect vital state interests must give way to paramount federal legislation.").

Nor does the presumption against preemption fit comfortably within the class of federalism-based "substantive" canons of statutory construction used by this Court "to harmonize statutory meaning with policies rooted in the * * * Constitution." W. ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION 329-30 (2000); see, *e.g.*, *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention *unmistakably clear* in the language of the statute.") (emphasis added). For one thing, as

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[6] The judicially created "presumption" makes no more sense when applied to forms of "implied" preemption, where it has the effect of allowing greater conflict with (or frustration of the purposes of) federal law by state law than the Supremacy Clause would otherwise permit.

explained above, the presumption against preemption is *not rooted in principles of federalism. For another*, as Justices Scalia and Thomas correctly noted in *Cipollone*, in "none" of these other settings does a clear-statement rule "exist[] alongside a doctrine whereby the same result so prophylactically protected from careless explicit provision can be achieved *by sheer implication*, with no express statement of intent at all." 505 U.S. at 547 (emphasis in original). And in none of these other settings does a clear-statement rule coexist with the *opposite* presumption (such as the established presumption *in favor of* preemption in areas, such as foreign affairs, where federal interests are "dominant"). Only in the law of federal preemption does this "novel regime" exist. *Ibid.*

5. This Court has acknowledged that the principles governing federal preemption are "already • • • difficult to apply" and, accordingly, it has pointedly declined to "complicat[e]" this important area of law "further" by adopting new presumptions and special burdens that would create "practical difficulties" for litigants and lower courts alike. *Geier*, 529 U.S. at 873. The same salutary objective of clarifying and rationalizing preemption law supports using this case to reconsider, and perhaps abandon or limit, the flawed presumption against preemption.

Finally, further review would bring the added benefit of dispelling confusion that may have been caused by this Court's own inconsistent treatment of the presumption against preemption, which PLAC has previously documented. See Br. of PLAC As *Amicus Curiae*, *United States* v. *Locke*, Nos. 98-1701 & -1706, at 5-7; see also *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 63 (2002) (relying on "natural[] read[ing]" of express preemption clause without any mention of presumption); *Engine Manufacturers Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 256 (2004) ("not all Members of this Court agree" on the use of a "presumption against preemption").

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

PRODUCT LIABILITY ADVISORY COUNCIL, INC.
LIST OF CORPORATE MEMBERS

3M
Altec Industries
Altria Corporate Services, Inc.
American Household, Inc.
American Suzuki Motor Corporation
Amgen Inc.
Andersen Corporation
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
Aventis Pharmaceuticals, Inc.
BASF Corporation
Bayer Corporation
Bell Sports
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Briggs & Stratton Corporation
Bristol-Myers Squibb Company
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chevron Corporation
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
DaimlerChrysler Corporation

Deere & Company
The Dow Chemical Company
E & J Gallo Winery
E.I. DuPont De Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Freightliner LLC
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
The Heil Company
Honda North America, Inc.
Hyundai Motor America
ICON Health & Fitness, Inc.
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Komatsu America Corp.
Kraft Foods North America, Inc.
Lincoln Electric Company
Masco Corporation
Mazda (North America), Inc.

McNeilus Truck and Manufacturing, Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.
Michelin North America, Inc.
Miller Brewing Company
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Consumer Health, Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc
Panasonic
Pentair, Inc.
Pfizer Inc.
Pharmacia Corporation
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co.KG
The Raymond Corporation
Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.

Thomas Built Buses, Inc.
TK Holdings
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive US LLC
Tyson Foods, Inc.
UST (U.S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

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No. 05-198

IN THE

Supreme Court of the United States

NOKIA, INC., *et al.*,

Petitioners,

v.

GARRETT NAQUIN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a not-for-profit corporation that has neither a parent nor stockholders.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest federation of businesses, representing an underlying membership of more than three million businesses and organizations, with direct members of every size in every industrial sector and geographic region of the country. Chamber members transact business in all or nearly all of the United States, as well as in a large number of countries around the world. An important function of the Chamber is the representation of its members' interests before the courts, Congress, and the Executive Branch.

To that end, the Chamber has participated as *amicus curiae* in numerous cases before this Court that have raised issues of vital concern to the Nation's business economy, including several cases that addressed the subject of federal preemption. *See, e.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); *United States v. Locke*, 529 U.S. 89 (2000); *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). The Chamber has long been a strong advocate of national uniformity in the regulatory sphere. The predictability engendered by a uniform federal regulatory scheme promotes efficient business operations and protects businesses whose products and services are marketed nationwide against the costs and risks of navigating a maze of inconsistent state laws and regulations.

Many of the Chamber's members engage in multi-state operations. The question whether conduct otherwise subject to a uniform federal regulatory scheme can nevertheless be "regulated" via the application of state tort law is therefore of direct interest to Chamber members. The decision of the Fourth Circuit Court of Appeals directly implicates that

interest. Because the Fourth Circuit's preemption analysis is flatly inconsistent with this Court's settled agency preemption jurisprudence, and because its reasoning could have far-reaching and disastrous implications for countless interstate businesses that depend upon the certainty, predictability, and uniformity of a federal regulatory framework, the Chamber and its members have a strong interest in the Court granting plenary review and correcting the erroneous judgment of the court below. The Chamber files this brief with the consent of all parties.[1]

SUMMARY OF THE ARGUMENT

The federal regulations at issue here establish comprehensive emissions testing and certification standards and set a maximum level of acceptable radio frequency ("RF") emissions for handheld wireless telephones. They are the product of years of agency study under a congressional mandate to balance competing national priorities in public health and safety against the national imperative of a seamless and reliable interstate wireless communications network. The decision below nonetheless held that this comprehensive federal regulatory regime does not preempt state tort law in the absence of an express *congressional* pronouncement of intent that the federal regulatory scheme operates to the exclusion of state law. The Fourth Circuit's newly-minted standard for agency conflict preemption runs directly contrary to decades of settled preemption jurisprudence, and it invites lay juries, under various state products liability and tort laws, to nullify the detailed federal standards governing certification of wireless telephones and maximum, "safe" RF emissions levels. As the Petition points out, after *Pinney*, state juries are invited to perform their own risk/utility balancing, to

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than the Chamber, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

impose an endless variety of requirements for RF emissions testing and certification, and even to establish new maximum levels of RF emissions with no regard for the federal RF emissions standard. Pet. 2-3, 23.

The implications of the court below's new agency preemption standard extend well beyond the wireless telephone industry. Under the Fourth Circuit's new preemption framework, duly enacted federal regulations lack independent preemptive force unless Congress expressly indicates that the federal regulations preempt state law. After *Pinney*, every federal regulatory scheme intended to have uniform nationwide application that falls short of this new "congressional plain statement" requirement can be undermined by any lay jury applying state tort law, at least within the geographic boundaries of the Fourth Circuit. The implications for interstate business are staggering—in essence, a federal agency's comprehensive product analysis and pre-market approval based on specified design, operational, or labeling standards is rendered meaningless. Consequently, the decision will generate uncertainty and potentially unbridled retroactive liability for countless companies that do business across the Nation.

ARGUMENT

I. THE FOURTH CIRCUIT DISREGARDED FUNDAMENTAL AND LONG-ESTABLISHED PRINCIPLES OF AGENCY PREEMPTION

This case poses the question whether a comprehensive federal regulatory scheme, uniform in its application and nationwide in its reach, can be cast aside in favor of *ad hoc* "standards" set by juries applying state tort law unless Congress expressly delegates preemptive authority to the agency. The court below, ignoring or misreading settled principles of conflict preemption, held that the federal scheme can be subjected to such a nullification by dissection. In doing so, the decision below draws into question not only the uniform applicability of the Federal Communication

Commission's ("FCC") RF emissions standard, but also the function of countless federal regulatory schemes that provide certainty and uniformity critical to companies whose business crosses state lines. These include many areas where Congress has entrusted federal agencies to evaluate product safety and efficacy based on national scientific standards and where federal regulations mandate certain design, labeling, and operational standards that must be exclusive to have any meaning or effect.

1. The Fourth's Circuit's conclusion that a federal regulation cannot preempt state common law in the absence of *statutory* language reflecting preemptive intent both ignores the logical import of a broad delegation of regulatory authority to an expert agency and misapplies settled conflict preemption precedents.

In the Communications Act of 1934, Congress conferred broad authority on the FCC to regulate all technical aspects of interstate communication by radio. 47 U.S.C. § 303; *see also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984). Of particular relevance here, the FCC's plenary authority over radio communications extends specifically to "the kind of apparatus to be used *with respect to its external effects* and the purity and sharpness of the emissions from each station and from the apparatus therein." 47 U.S.C. § 303(e) (emphasis added). Pursuant to that sweeping statutory mandate, and in discharge of its obligations under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4335, the FCC, in consultation with the Food and Drug Administration ("FDA") and other agencies, created detailed standards that specify pre-market testing and equipment authorization procedures and set a maximum acceptable level of RF emissions from all wireless transmitters, including cellular telephones. *See* 47 C.F.R. § 2.1093(d). In fact, Congress took the extraordinary step of commanding the FCC to swiftly conclude its RF rulemaking, so that national standards would be in place. Pub. L. No. 104-204, § 704(b), 110 Stat. 56 (1996). As the Petition

points out, both the FCC and the FDA have declared that any wireless cell phone that complies with the FCC's RF testing and emissions standards "is a 'safe' phone." *See* Pet. 20 n.4 (quoting FCC/FDA Website – *Market Sense, Cell Phones: Facts, Fiction, Frequency, available at* <http://www.fcc.gov/cgb/cell_phones.html>). These expert agencies have also concluded that a "headset mandate," part of the relief sought by these plaintiffs, would not serve the public interest or increase RF safety. *Id.*

Just four years after the FCC issued its RF regulations, Respondents filed a class-action complaint in Louisiana state court alleging that wireless telephones that satisfy the FCC's RF emissions standards are nevertheless defective and unreasonably dangerous under state tort law, based on the level of RF emissions they produce.[2] As is increasingly typical of "consumer" class actions, Respondents, like other wireless-telephone class action plaintiffs, did not seek damages for any *physical* injury they attribute to the use of cellular telephones; instead, they sought a judgment directing manufacturers of wireless telephones to provide headsets for every wireless telephone, along with warnings that wireless phones are unsafe when used without a headset.[3]

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[2] Respondents' complaint (*Naquin*) was one of five similar class-action complaints filed in various state courts. The five complaints were removed to the appropriate federal district courts and were consolidated for pretrial proceedings in the U.S. District Court for the District of Maryland by the Judicial Panel on Multidistrict Litigation. *See In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, 170 F. Supp. 2d 1356 (J.P.M.L. 2001). The Fourth Circuit's decision was rendered *sub nom Pinney v. Nokia, Inc.*, 402 F.3d 430 (4th Cir. 2005). The Fourth Circuit found a lack of subject matter jurisdiction in four of the five consolidated cases; it reached the merits of the federal preemption question only in Respondents' case, in which jurisdiction, based on diversity of citizenship, was not at issue. The Petition concerns only Respondents' case, *Naquin v. Nokia, Inc.* (No. 03-1433, 4th Cir.).

[3] Indeed, the complaint is based on the proposition that alleged scientific uncertainty as to RF effects requires a more prophylactic approach to RF safety. Thus, these lawsuits are more in the nature of a

In permitting this state law challenge, the Fourth Circuit was indifferent to the FCC's considered judgment that telephones compliant with the RF standard are "safe" for use by consumers, as well as the agency's repeated indications that it intended its cellular telephone regulations to apply uniformly and *exclusively* nationwide. *See* Pet. 7-8, 19, 20 n.4, 24. The Fourth Circuit also disregarded the FCC's plenary authority to regulate every aspect of cellular telephone technology, including equipment design and signal strength. Indeed, the court completely ignored both the preemptive scope of the RF *regulation* and whether the state law claims constituted an "obstacle" to achievement of the regulation's goals. Rather, the decision below concluded that the FCC's validly enacted regulation cannot preempt even conflicting state tort law in the absence of clear "evidence" of "a congressional goal of achieving preemptive national RF radiation standards for wireless telephones." Pet. App. 42a, 43a.

2. The Fourth Circuit's preemption analysis built error upon error. It is by now settled beyond dispute that, to the extent that state law *actually conflicts* with federal law, either because it would be impossible to comply with both or because state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," state law is preempted, even in the absence of an express statutory provision specifying preemption of state law. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977). As these decisions make clear, conflict preemption is triggered not only when compliance

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petition for review challenging the FCC RF rules as insufficiently protective, than a traditional state tort suit alleging that a specific product has directly caused physical or emotional injury.

with state law makes compliance with federal law impossible, but also when application of a state-law standard would upset a policy balance struck by federal law. *Hines*, 312 U.S. at 67 (preemption triggered when state law poses an obstacle to accomplishment of federal purposes, whether the "obstacle" is termed "conflicting; contrary to; . . . repugnance; difference; irreconcilability; inconsistency; violation; curtailment; [or] interference").

Heedless of these principles, the Fourth Circuit countenanced the application of state law to determine whether wireless telephones that satisfy the federal RF emissions standard nevertheless can be deemed "unsafe," even though state-law RF emissions "standards" crafted by state juries are certain to upset the delicate balance of interests reflected in the federal RF regulation. As the Petition points out, allowing juries to reach their own judgments about the safe operation of wireless telephones, guided only by the general principles of state products liability law, will inevitably disrupt the FCC's comprehensive regulatory scheme. Pet. 19-22, 23-24.[4] From the outset of its regulation of wireless service, the FCC has made clear that its design and operational standards must be uniform and cannot be effective in the face of conflicting or additional state directives. Pet. 7-8. It is also clear that the federal RF regulations balance competing national

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[4] The panel majority recognized as much when it noted, without disagreement, the district court's conclusion that allowing state-law claims like Respondents' to proceed would "stand as an obstacle to 'Congress' objectives of achieving national uniformity in wireless telecommunications services and striking a balance between the proliferation of wireless services and the need to protect the public from any harmful effects of RF exposure.'" Pet. App. 41a (quoting *In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, 248 F. Supp. 2d 452, 463 (D. Md. 2003)). Rather than dispute the district court's conclusion, the Fourth Circuit pointed to the absence of statutory "evidence of such an objective" on the part of Congress to achieve exclusive, uniform national regulation of RF emissions. *Id.* at 42a.

priorities in a way that any state additions or subtractions from that regulatory equation will necessarily conflict with federal law. Indeed, as the dissenting judge noted below, the *very purpose* of these lawsuits is to tip that balance in one direction, contrary to the policy decisions embodied in the federal RF rules themselves. App. 46a-47a (Kiser, J., dissenting).

The Fourth Circuit simply ignored these self-evident conflicts with the federal regulatory regime (and its reasoning is equally applicable to conflict of the "impossibility" sort). The panel majority considered only whether Congress, not the agency itself, had evidenced a specific intent that federal law supply the exclusive standard for measuring safe RF emissions from wireless handsets.

The lower court's conclusion that state law is not preempted in the absence of evidence of congressional intent to preempt contains two fundamental deviations from this Court's precedents: *first*, that the absence of an express statement of preemptive intent in the statutory delegation of authority to an agency suggests that any regulation promulgated pursuant to that delegation cannot preempt state common-law claims, and *second*, that a regulation lacks independent preemptive force.

a. The Fourth Circuit acknowledged the three distinct theories under which federal law can preempt state law (Pet. App. 34a), but improperly conflated express and implied preemption when it required an *expression* of preemptive intent in order to find that state law was *impliedly* preempted. As a matter of both common sense and legal theory, the standard for determining whether preemption should be *inferred* cannot be whether it is *expressly stated*. "[C]onflict preemption is different [than express preemption] in that it turns on the identification of 'actual conflict,' and not on an express statement of pre-emptive intent." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000) (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990)). Nor does a

finding of conflict preemption turn on some quantum of independent "evidence" of congressional intent to preempt, short of an express statutory declaration.

This Court, condemning the "narrow focus on Congress' intent to supersede state law," has emphatically rejected the Fourth Circuit's "express statement" requirement for agency conflict preemption: "A pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Fid. Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 154 (1982).[5] Agency preemption arises not from a declaration of congressional intent, but directly from the constitutional primacy of federal law. *Geier*, 529 U.S. at 873. Since a federal regulation is superior to state law, that inferior law is preempted if it stands as an obstacle to accomplishing the purposes of the properly-authorized federal regulation; it need not also affirmatively conflict with the authorizing statute. Moreover, Congress is well aware of the primacy of federal regulation over state law, so it obviously understands that a federal regulation overrides state law in the event of a conflict. It would therefore merely be an empty formalism to require that Congress affirmatively state this truism when it delegates rule-making authority to an agency, or to require Congress to

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[5] Similarly, the agency itself need not declare its intent that a regulation operate preemptively in order to trigger conflict preemption. Just as Congress is not obligated to announce its intent that a statute preempt state law, a regulation need not "address pre-emption explicitly." *Geier*, 529 U.S. at 884. "Indeed, one can assume that Congress *or an agency* ordinarily would not intend to permit a significant conflict." *Id.* at 885 (emphasis added). That assumption is appropriate but not strictly necessary in this case, because the FCC repeatedly has announced its intent that its wireless telephony regulations apply uniformly and to the exclusion of state law. *See* Pet. 7-8, 19 (quoting, *inter alia*, *In re An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz*, 89 FCC 2d 58, 95 ¶ 81 (1982) ("It is imperative that no additional requirements be imposed by the states which could conflict with our standards and frustrate the federal scheme for the provision of nationwide cellular service.")).

particularize this truism with respect to every specific area where a conflict with federal regulations could arise.

b. Implicit in the Fourth's Circuit's conflict preemption analysis is a second and related analytical error: the assumption that a federal regulation cannot be considered, independent of the statute pursuant to which it was promulgated, to determine whether conflict preemption applies. In the Fourth Circuit, it is no longer true that "[f]ederal regulations have no less preemptive effect than federal statutes." *Fid. Fed. Sav. & Loan*, 458 U.S. at 153. According to *Pinney*, the principles of conflict preemption apply differently – or more strictly – when the federal law at issue takes the form of a regulation rather than a statute. Under the lower court's analysis, even a stark "impossibility" conflict between the operation of a regulation and the application of state tort law is insufficient to trigger conflict preemption unless *Congress itself* has preempted state law.

But this Court has declared repeatedly that the conflict preemption analysis does not vary when the federal law at issue is a regulation rather than a statute. The Supremacy Clause "encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization." *City of New York v. Fed. Commc'ns. Comm'n*, 486 U.S. 57, 63 (1988). A federal regulation has no less preemptive force than a federal statute; both are, equally for preemption purposes, the "'supreme Law of the Land.'" *Id.* (quoting U.S. Const. art VI, cl. 2). When "state law could impose legal duties that would conflict directly with federal regulatory mandates," state law must give way to the primacy of the federal *regulation* no less than it would if the conflict arose from a federal *statute*. *Geier*, 529 U.S. at 871. It follows that "[p]re-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation." *La. Pub. Serv. Comm'n v. Federal Commc'ns. Comm'n*, 476 U.S. 355,

369 (1986) (citing, *inter alia*, *Fid. Fed. Sav. & Loan*, 458 U.S. 141).

Nor does a regulation's preemptive force turn on a congressional declaration of intent to preempt. Even absent an express delegation of preemptive authority, "[t]he statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York*, 486 U.S. at 64; *see also Fid. Fed. Sav. & Loan*, 458 U.S. at 153-54. Put another way, the principles of conflict preemption apply without variation when a regulation rather than a statute is at issue.

When an agency promulgates a regulation with uniform nationwide application, that regulation is entitled to the same deference afforded to statutes that, either by their express terms or in their operation, preempt conflicting state law. After *Pinney*, that principle holds true in every state other than those within the Fourth Circuit.

3. Settled principles of conflict preemption foreclose the "express statement" requirement imposed by the court below with good reason: It is simply not possible for Congress to foresee whether an agency, in the exercise of its expertise and judgment, eventually will determine that a regulation ought to operate uniformly nationwide to the exclusion of state law. Nor is it possible for Congress to predict all the myriad ways that state law might conflict with federal regulations yet to be promulgated. Congress confers the task of considering, formulating, and implementing regulations upon an agency in broad terms precisely because the agency can bring to bear technical or scientific expertise, unique knowledge, and relevant experience that Congress lacks. *See, e.g., Chevron U.S.A., Inc. v. Nat'l Res. Defense Council, Inc.*, 467 U.S. 837 (1984). The legislature expects and intends that an agency, given a broad mandate to regulate in the public interest, will fill via regulation "gaps" in the general statutory framework. *Id.* at 843-44. Among the gaps

frequently left to the agency to consider and, where appropriate, to address in the exercise of its delegated authority is the question whether state law can and should be permitted to apply concurrently with the federal regulation. Such "gap-filling" is particularly important, and necessary, where rapid technological change requires new and updated implementation of Congress' goals to deal with unforeseen developments. Requiring Congress to predict in advance whether a regulation, yet to be created, should operate preemptively impermissibly interferes with both the legislative and administrative function.

Just as the task of balancing relevant interests and objectives is left to an agency in the discharge of its statutorily delegated authority, the determination whether and when to preempt state law in favor of a uniform federal rule should be made by the agency in the exercise of its judgment. The agency is perfectly free to conclude – even absent an express pronouncement of preemptive intent by Congress – that its standard should have uniform, nationwide application, to the exclusion of state law. *See, e.g., United States v. Shimer*, 367 U.S. 374, 381-82 (1961).

In this case, as in *Geier*, "Congress has delegated to [the FCC] authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive. The agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements." 529 U.S. at 883. If, in the exercise of that unique expertise, the agency determines that its regulation ought to be applied uniformly and exclusively nationwide, that judgment is due deference. *Id.*; *see also, e.g., City of New York*, 486 U.S. at 64 ("if the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have

sanctioned'") (quoting *Shimer*, 367 U.S. at 383). Here, although there was no evidence or argument that Congress would not "have sanctioned" the balance struck by the FCC, the Fourth Circuit nevertheless ignored the regulation because it determined that Congress had not affirmatively foreseen and prospectively "authorized" this particular application of the agency's delegated authority and expertise.

In short, in the guise of deferring to legislative judgments, the court below actually imposed a maze through which it is impossible for Congress to navigate. This is particularly true because the decision below interpreted the statute's express preemption provisions as creating a negative implication that Congress intended *not* to preempt any regulatory areas outside the four corners of those express provisions. Pet. App. 43a-44a. Thus, according to the court below, in those cases where Congress has foreseen the need for federal regulation, and expressly preempted some but not all state regulation in that area, these facts strongly "weigh[] against" finding that federal regulation preempts conflicting state law in areas where the statute is silent about preemption—no matter how stark the conflict or how obvious the need for uniform national regulation. *Id.* at 43a.

This "*expressio unius*" rule of preemption, when coupled with the affirmative "congressional statement" requirement, creates a rule necessitating that Congress affirmatively anticipate and reconcile potential federal/state-law conflicts in every context where federal regulations may reach. This result is truly "extraordinary: The statute that says *anything* about pre-emption must say *everything*; and it must do so with great exactitude, as any ambiguity concerning its scope will be read in favor of preserving state power." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 548 (1992) (Scalia, J., dissenting) (emphasis in original). Whatever the merits of such a rule in other contexts, it makes no sense to the extent it is used to cabin the preemptive scope of federal regulations that Congress has affirmatively authorized (albeit without

adding the meaningless confirmation that such uniform regulations preempt conflicting state laws).[6]

4. The Fourth Circuit compounded its analytical errors by placing a thumb on the scale against a finding of conflict preemption by invoking the "presumption against preemption." Pet. App. 34a-35a & n.4 (citing *United States v. Locke*, 529 U.S. 89 (2000)). The presumption has no logical application in a conflict preemption analysis. If application of a state's law does in fact "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines*, 312 U.S. at 67, it follows as a matter of logic that any "presumption" against preemption has necessarily been overcome. Were the rule otherwise, a state law which affirmatively conflicted with federal law could nonetheless be valid, because the conflict somehow does not overcome the "presumption." This principle cannot be squared with the constitutional supremacy of federal law: No "presumption" can sanction a state law which directly conflicts with federal law.

* * *

Taken together, the Fourth Circuit's misguided "express statement" requirement and its presumption against preemption turn the agency conflict preemption analysis on its head. As the Petition observes, in the Fourth Circuit, a federal regulation is now *presumed* to be subordinate to state tort law in the absence of an express statement of preemptive intent by Congress. Pet. 3-4. That inversion of the agency conflict preemption analysis not only threatens the efficient operation of the Nation's wireless telephone system, it also endangers the operation of countless other regulatory

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[6] Ironically, the Fourth Circuit's new "plain statement" rule will actually disserve federalism interests by forcing Congress or federal agencies to adopt broad prophylactic statements of preemptive intent in advance of evaluating actual conflicts with state law.

schemes intended to have uniform and exclusive application to a variety of vital strains of national commerce.

II. THE DECISION BELOW HAS SIGNIFICANT AND FAR-REACHING CONSEQUENCES FOR INTERSTATE COMMERCE IN NUMEROUS FEDERALLY REGULATED INDUSTRIES

The implications of the Fourth Circuit's new agency conflict preemption standard reach well beyond the telecommunications arena. Under the Fourth Circuit's decision, every company that does interstate business in an industry subject to uniform and comprehensive federal regulation now must question whether even strict compliance with the applicable federal standards nevertheless leaves the company exposed to significant tort liability for failure to satisfy some stricter "standard" imposed after-the-fact by state juries on an *ad hoc* basis.

1. Businesses operating nationwide in a multitude of industries critical to our national economy — pharmaceuticals, transportation and highway safety, railroads, aviation, banking, securities, workplace safety, advertising, agriculture, and countless others – are subject to detailed and comprehensive federal regulation. Despite the existence of governing regulatory frameworks, however, businesses operating in each industry repeatedly have been called to fend off attempts by plaintiffs, often suing on behalf of a class, to displace the applicable federal regulations with state tort law judgments that impose different and varying standards of liability. The examples are countless. *See, e.g.*, *Fifth Third Bank ex rel. Trust Officer v. CSX Corp.*, 415 F.3d 741, 745 (7th Cir. 2005) (state-law personal injury and wrongful death claims challenging the adequacy of warning signs at railroad crossing preempted by regulations promulgated pursuant to the Federal Railroad Safety Act); *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380, 384 (5th Cir. 2004) (state-law failure-to-warn claim alleging that airline was negligent in failing to advise passenger of risk of deep

vein thrombosis preempted by comprehensive federal regulations governing warnings provided to airline passengers); *Lynnbrook Farms v. Smithkline Beecham Corp.*, 79 F.3d 620, 624-25 (7th Cir. 1996) (state-law products liability and misrepresentation claims alleging that plaintiff's cattle were injured following inoculation with animal vaccine preempted by regulations promulgated by Animal and Plant Health Inspection Service governing safety, efficacy, potency and purity of vaccinations); *Moore v. Kimberly-Clarke Corp.*, 867 F.2d 243, 244-46 (5th Cir. 1989) (state law failure-to-warn claim alleging that tampon manufacturer failed adequately to warn of risk of toxic shock syndrome preempted FDA regulation establishing toxic shock warning requirements); *In re Bridgestone/Firestone Inc. Tires Prods. Liab. Litig.*, 153 F. Supp. 2d 935, 946-48 (S.D. Ind. 2001) (state-law class actions against manufacturers of automobile tires seeking, *inter alia*, recall of tires under state law preempted by Motor Vehicle Safety Act's delegation of authority to National Highway Traffic Safety Administration to oversee product recalls). *See also, e.g., Horn v. Thoratec Corp.*, 376 F.3d 163, 170-71 (3d Cir. 2004) (state-law products liability claims alleging defective design and manufacture of heart pump and failure to warn preempted by pre-market approval process established by Food, Drug & Cosmetic Act).

As these decisions illustrate, until now, courts almost uniformly have rejected class-action plaintiffs' invitation to undermine federal regulatory schemes governing design, testing, labeling, and other safety-related or consumer protection issues, by allowing the development of a patchwork of disparate state "standards." Both this Court and the lower federal courts have recognized that permitting a jury to apply new, more "protective" standards fashioned from state tort law threatens to upset the "delicate balance" struck by a federal agency charged with crafting regulations in furtherance of its statutory mandate. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001). *See*

also, e.g., *Geier*, 529 U.S. at 881; *Witty*, 366 F.3d at 385 ("Allowing courts and juries to decide under state law that warnings should be given in addition to those required by [an agency] would necessarily conflict with the federal regulations.").

The Fourth Circuit's conflict preemption standard likely would have led to a different outcome in nearly every case listed above, in which a plaintiff attacked the testing, labeling, manufacture, marketing, or operational safety of any of a number of products marketed or services provided nationwide and subject to federal regulation. In every case, the regulators' considered and expert judgments would likely have been set aside in favor of state-law "standards" established by lay juries, merely because the delegating statute did not itself preempt state law in all contexts.

As a consequence, the decision below threatens to change the interstate business landscape dramatically. The very existence of the Fourth Circuit's opinion necessarily calls into question business judgments made on an ongoing basis. As long as *Pinney* remains on the books, companies doing business in a federally-regulated industry within the geographic reach of the Fourth Circuit can no longer be certain that even strict compliance with detailed regulatory standards governing design, manufacture, marketing, labeling, testing, and other safety measures will be sufficient to insulate them from liability for damages under a patchwork of state tort laws.

The application of the panel majority's new preemption rule poses an even greater danger to multistate business operations. After *Pinney*, a federal regulation designed and intended to have uniform and exclusive application nationwide no longer preempts even directly conflicting state law. A regulation that reflects a federal agency's considered and expert weighing of pertinent costs, risks, and benefits can be set aside effortlessly by a lay jury applying nothing more than the extremely general guidelines supplied by state

tort law. If the regulation sets a *minimum* (or *maximum*) safety standard, prescribes a manufacturing or testing process, or dictates appropriate warnings to consumers, a jury applying state law is nevertheless free to determine that the federal safety standard is insufficiently strict, the federally mandated warnings not comprehensive enough, or the federal testing requirements less thorough than the plaintiff would prefer. *Pinney* opens the door to remarkable state-law-based second-guessing of expert agency judgments.

The result would be grave enough if a single jury in a single state were empowered to override an otherwise-applicable federal regulation. But *Pinney* invites something far worse: Any number of juries in every state are free to reconsider the balance of factors reflected in a federal regulation and to arrive at their own after-the-fact judgments. And if multiple juries in all 50 states are authorized to reach their own conclusions about safety (or marketing, or testing, or design), compliance with the law governing the design, testing, marketing, and labeling of a product or service will be all but impossible.

2. The harms that inevitably will flow from the Fourth Circuit's errors are particularly acute because the decision below devolves authority from the federal government to state *juries*, not to state lawmakers. In light of *Pinney*, multi-state businesses can take no comfort from efforts to conform even to a "crazy-quilt" of varying but readily discernible state laws and regulations. Instead, businesses will be expected to comply with a hodge-podge of post-hoc judgments of lay juries in class-action tort cases. The "rules" represented by those judgments are unknowable in advance, placing companies in the impossible position of attempting to conform their conduct to standards that exist only after the fact, as one jury after another reconsiders whether a standard established by federal regulation is sufficient under state law.

The division of regulatory responsibility between federal and state regulators makes sense in a variety of contexts, and Congress has affirmatively sanctioned, and the Courts have recognized, a dual regulatory scheme in those settings. *See, e.g., La. Pub. Serv. Comm'n*, 476 U.S. at 370-71 (dual state and federal regulation of rules governing depreciation of property used by telephone companies); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 293 (1997) (separate state and federal regulatory authority over intrastate versus interstate gas trade).[7] In this case, however, the Fourth Circuit displaced the considered judgment of federal regulators in favor of *ad hoc*, after-the-fact decisions of state juries, not state lawmakers. To the extent that the federal government considered a place in the regulation of nationwide wireless telecommunications (or any of the many other multi-state industries subject to extensive federal regulation) for the States, it surely envisioned that the state actor would be a regulatory body, not a jury. In the context of RF emissions, the intended nationwide, uniform application of the federal regulation plainly displaces state *regulation*. *A fortiori*, "regulation" of RF emissions by lay *juries* applying state tort law is even more clearly preempted. Moreover, *Pinney* invites state juries to make these sorts of *ad hoc* determinations in the context of large class actions, in which emotion, rather than reason or policy, may well influence the outcome.

The threat of massive damages awards in large state-law class actions necessarily will have a standard-setting effect. A company that markets a product or service both acceptable to federal regulators and allowable under the laws of 49 of the 50 states, but which faces an adverse judgment in a single tort case in a single state, will have little choice but to

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[7] As the Petition points out (Pet. 5-8), the history in the area of radio communications has, quite logically, been one of exclusive federal control. This makes the Fourth Circuit's devolution of authority to state litigants and lay juries all the more extraordinary.

alter its conduct to satisfy the "standard" established by the decision of that lone jury applying a single state's tort law. In effect, *Pinney* removes regulatory authority from the expert agency Congress charged to act, and places it in the hands of plaintiffs' lawyers and inexpert state jurors in a race to impose the most onerous standard. Such reallocation of authority defies the Supremacy Clause, and it is particularly ill-suited to the many industries in which the development of standards for design, manufacturing, labeling, and safe operation require the application of scientific or technical expertise.

3. In every industry for which the market for goods and services is truly national, the importance of a unified, centralized standard-setter is paramount. A uniform and exclusive federal regulatory framework provides certainty and consistency that facilitates multi-state business dealings. That consistency is essential to the development and operation of a truly national wireless telephone network, as explained in the Petition. *See* Pet. 17, 20-21, 23. It is no less crucial for the many other industries whose business operations regularly and necessarily cross state lines.

Without this Court's intervention, the Fourth Circuit's decision will cast doubt on a multitude of interstate business operations, because companies cannot know, in light of *Pinney*, whether satisfying federal regulatory requirements will be sufficient to foreclose liability under a patchwork of state laws. Because the Fourth Circuit's rationale threatens the validity of countless regulatory schemes that provide the predictability and uniformity essential to multistate business operations, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NOKIA INC., *et al.*,

Petitioners,

v.

GARRETT NAQUIN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION IN SUPPORT OF PETITIONERS

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Omnipoint Holdings, Inc. v. *Town of Westford*, 206 F. Supp. 2d 166 (D. Mass. 2002) 15

Telespectrum, Inc. v. *Public Service Commission of Kentucky*, 227 F.3d 414 (6th Cir. 2000) 15

United States v. *Locke*, 529 U.S. 89 (2000) 2, 3, 11

ADMINISTRATIVE MATERIALS

First Report and Order and Notice of Proposed Rulemaking, *E911 Requirements for IP-Enabled Service Providers*, 2005 WL 1323217, ___ FCC Rcd ___ (2005) 16

Memorandum Opinion and Order, *Amendment of the Commission's Rules to Establish New Personal Communications Services*, 9 FCC Rcd 4957 (1994) 8, 9

Notice of Inquiry, *Effects of Communications Towers on Migratory Birds*, 18 FCC Rcd 16938 (2003) 14

Notice of Proposed Rulemaking, *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, 18 FCC Rcd 20802 (2003) 8, 9, 10, 11

TABLE OF AUTHORITIES—Continued

Page(s)

Order, *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 20 FCC Rcd 7709 (2005) 18

Report and Order and Further Notice of Proposed Rulemaking, *Extending Wireless Telecommunications Services to Tribal Lands*, 15 FCC Rcd 11794 (2000) 8

Report and Order and Further Notice of Proposed Rulemaking, *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, 19 FCC Rcd 19078 (2004) 9, 13

Report and Order and Further Notice of Proposed Rulemaking, *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 11 FCC Rcd 18676 (1996) 16

Report and Order, *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, 86 F.C.C.2d 469 (1981) 11

Report and Order, *Improving Public Safety Communications in the 800 MHz Band*, 19 FCC Rcd 14969 (2004) 19

Report and Order, *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, 20 FCC Rcd 1073 (2004) 14

Second Report and Order, *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, 17 FCC Rcd 23193 (2002) 10

TABLE OF AUTHORITIES—Continued

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STATUTES AND REGULATIONS

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§ 63.18 6
Part 64, Subpart U 6
§ 64.1195 6
§ 64.2401 6
§ 64.3001 16
§ 64.3002 16
§ 64.402 19

OTHER AUTHORITIES

Fact Sheet, *Wireless 911 Services*, FCC Consumer & Governmental Affairs Bureau, *available at* http://www.fcc.gov/cgb/consumerfacts/wireless911srvc.html (last visited Oct. 3, 2005) 16

FCC Amended Report to Congress on the Deployment of E-911 Phase II Services by Tier III Service Providers: Submitted Pursuant to Public Law No. 108-494 (Apr. 1, 2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-79A1.pdf 17

Harte, Lawrence, *Introduction to EVDO: Physical Channels, Logical Channels, Network and Operation* (2004) 10

TABLE OF AUTHORITIES—Continued

Page(s)

Hatfield, Dale N., *A Report on Technical and Operational Issues Impacting the Provision of Wireless Enhanced 911 Services, available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513296239 (last visited Oct. 3, 2005) 18

Hughes, David W., *When NIMBYs Attack: The Heights to Which Communities Will Climb to Prevent the Siting of Wireless Towers*, 23 J. Corp. L. 469 (1998) 14

Local Telephone Competition: Status as of December 31, FCC Wireline Competition Bureau Report (rel. July 8, 2005), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0705.pdf 7

National Association of Regulatory Utility Commissioners, *Resolution Regarding the Suspension or Waiver of the December 31, 2005 Deadline for 95 Percent Penetration of Location-Capable Handsets* (adopted July 27, 2005), *available at* http://www.naruc.org/associations/1773/files/LocationCapableHandsets_s0705.pdf 18

Rappaport, Theodore S., *Wireless Communications: Principles and Practice* (2d ed. 2002) .. 9, 10, 13, 14

Trends in Telephone Service, FCC Wireline Competition Bureau Report, Table 11.1 (rel. June 21, 2005), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend605.pdf 8

INTEREST OF THE *AMICUS CURIAE*[1]

The Cellular Telecommunications & Internet Association ("CTIA") represents all sectors of the wireless communications industry. Members of CTIA include wireless service providers, manufacturers, wireless data and Internet companies, and other industry participants. CTIA frequently participates in Federal Communications Commission ("FCC") proceedings and coordinates efforts to educate government agencies and the public about wireless issues.

CTIA members are subject to pervasive federal regulations that govern nearly every aspect of providing wireless equipment and service. Given the substantial resources needed to comply with these regulations, CTIA members depend on a stable regulatory environment in which federal rules are not undermined by conflicting local mandates. The need for uniformity and certainty is especially pronounced with respect to the FCC's rules regarding radio frequency ("RF") emissions. RF emissions are the basis of all wireless communication. Permitting states to set independent standards, whether by targeting emissions levels or by imposing onerous design or disclosure requirements, will impair the ability of CTIA members to serve their customers, making consumer and public safety communications less reliable and more expensive.[2]

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[1] Letters from all parties consenting to the filing of this brief are on file with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, CTIA states that no counsel for a party authored this brief in whole or in part. No person or entity, other than CTIA and its members, made any monetary contribution to the preparation or submission of this brief.

[2] CTIA is not a party to this proceeding. Its interest extends to the point that it is mentioned, but not named as a defendant, in the underlying *Naquin* complaint as part of an alleged civil conspiracy.

CTIA is one of the petitioners in *Cellco Partnership* v. *Pinney*, No. 06-207, which the Fourth Circuit also addressed in the panel opinion. The *Cellco* petition addresses a discrete issue involving application of the substantial federal question doctrine to four separate class actions distinct from the *Nokia* v. *Naquin* litigation. The *Cellco* petition asks this Court

SUMMARY OF ARGUMENT

The Fourth Circuit's decision to oust the FCC from its role as the exclusive regulator of RF emissions from mobile phones will have far-reaching ramifications. State rules affecting RF emissions cannot be drawn narrowly to avoid interference with the federal regime, because RF emissions are fundamental to interstate mobile wireless communications services. Subjecting CTIA's members to a patchwork of inconsistent state requirements will threaten the continued provision of wireless service at the quality and price expected by consumers.

The petition for certiorari thus raises issues that go to the heart of the FCC's ability to discharge its duty to "maintain control of the United States over all channels of radio transmission." 47 U.S.C. § 301. These issues are of extraordinary national importance and demand this Court's review.[1] Multiple considerations compel this conclusion. First, the Fourth Circuit undermined federal primacy over wireless regulation by applying a "presumption against preemption." In *United States* v. *Locke*, 529 U.S. 89, 108 (2000), this Court held that this presumption does not exist where there is a history of a "significant federal presence." In refusing to apply *Locke*, the panel ignored the comprehensive federal prescriptions that regulate every aspect of mobile wireless

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to vacate and remand the Fourth Circuit's jurisdictional ruling in light of the intervening decision in *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 125 S. Ct. 2363 (2005). Neither the panel's jurisdictional holding nor the class actions that were removed on federal question grounds are before this Court in the *Nokia* v. *Naquin* case that is the subject of the petition for certiorari in No. 05-198. Pet. I n.1. Because the various proceedings were consolidated below, CTIA participated as a defendant in joint briefing in the district court and court of appeals that argued that all claims in the consolidated actions were preempted by federal law.

[1] The Court should grant the petition and invite the Solicitor General to file a brief on the merits. Alternatively, CTIA endorses the suggestion of the Petitioners that the Court should request the views of the Solicitor General on this matter to help it determine whether to grant the petition. Pet. 24-25.

service. Congress and the FCC have established a framework that governs not only handset design and RF emissions, but every other aspect of providing service, from radio spectrum to the bill in the mailbox.

Second, subjecting these federal standards to state second-guessing is a recipe for chaos. The panel majority failed to consider the severe disruption state-by-state RF regulations would inflict on the wireless industry and its customers. Restrictions on the power of wireless handsets cannot be distinguished from restrictions on all the other elements of wireless networks. The design and signal strength of the wireless handset must be coordinated with every other part of the network, including base stations and switching equipment. Inconsistent local rules will create gaps in coverage and diminish the quality of both voice and data services.

Third, service disruptions caused by local RF regulations threaten public safety communications. They will harm 911 service because limiting the range of wireless phones necessarily limits their ability to reach emergency operators. Rules that lead to reduced handset power will likewise impair carrier efforts to offer enhanced 911 services that automatically transmit caller location information with 911 calls. Finally, divergent local rules governing wireless equipment design and operation will harm the ability of first responders to operate on an interstate basis.

ARGUMENT

I. THE PANEL MAJORITY FAILED TO RECOGNIZE THE COMPREHENSIVE FEDERAL PRESENCE IN THE WIRELESS INDUSTRY

The panel majority erred by mistakenly invoking a "presumption against preemption." Pet. 15; Pet. App. 34a. This Court has held that no such presumption applies "when the State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000). The panel concluded that "there is not the same federal presence in the wireless telecommuni-

cations area as there is in the area of maritime commerce." Pet. App. 34a-35a n.4. Not so. That glib assertion is wholly unfounded.

Federal law regulates every aspect of wireless telecommunications. At the statutory level, the Communications Act ("Act") forbids operation of radio devices, such as wireless phones, without a license, 47 U.S.C. § 301, and authorizes the FCC to promulgate regulations to prevent interference from other devices, *id.* § 302a; allocate frequencies, *id.* § 303(c); regulate the devices used, *id.* § 303(e); prevent interference generally, *id.* § 303(f); suspend licenses, *id.* § 303(m); inspect stations, *id.* § 303(n); require the illumination of radio towers, *id.* § 303(q); allocate spectrum, *id.* § 309; revoke licenses, *id.* § 312; issue construction permits, *id.* § 319; forbear from applying common carrier regulations to wireless carriers, *id.* § 332(c)(1); and allocate spectrum for public safety providers, *id.* § 337. The Act also vests the FCC with broad authority to make rules and regulations as needed to implement the Act or the FCC's responsibilities thereunder. *Id.* §§ 154(i), 201(b), 303(r).[4]

The FCC has used its delegated authority to establish a comprehensive national regulatory framework for mobile wireless services. Every stage of the process of providing mobile service—from acquiring spectrum, to phone design and certification, to building base stations, to network interconnection, to offering consumers the finished product—is closely regulated by the FCC.

Start with spectrum. FCC rules designate which frequencies are available for wireless services, 47 C.F.R. § 2.106; allocate spectrum licenses through auctions, see 47 C.F.R. Pt. 1, Subpart Q; impose build-out requirements for licensees, *see, e.g.*, *id.* § 24.203; establish licensee eligibility requirements, *see, e.g.*, *id.* § 24.12; protect licensees from in-

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[4] As the petition notes, there is no "intrastate" component to wireless services subject to state regulatory jurisdiction under 47 U.S.C. § 152(b). Pet. 27-28.

terference, *see, e.g.*, *id.* §§ 22.917(d), 24.237(a); provide for spectrum leases and transfers, *see, e.g.*, *id.* § 1.948(c); and regulate spectrum aggregation, *see, e.g.*, *id.* § 20.6.

Spectrum rights are useless without devices to exploit them. But before a manufacturer may bring a handset to market, it must first run a gauntlet of FCC rules. For example, applicants for device certification must submit test data that demonstrate compliance with all technical standards—one of which, notably, is the applicable RF exposure limit.[5] 47 C.F.R. §§ 2.1091, 2.1093; *see also id.* § 1.1307(b). For wireless devices regulated under Part 15 of the FCC rules, *id.* §§ 15.1 *et seq.*, the governing standards encompass antenna design, external RF power amplifiers and antenna modifications, restricted bands of operation, and radiated emission limits. *Id.* §§ 15.201-209. Many consumer devices operate in multiple bands, complicating the required compliance testing.

Certification requires more than test data. Applicants must submit a technical report that includes a "copy of the installation and operating instructions to be furnished the user," a "brief description of the circuit functions of the device along with a statement describing how the device operates," and a "report of measurements showing compliance with the pertinent FCC technical requirements." 47 C.F.R. § 2.1033(b)(3), (4), (6). The rules further require a number of diagrams, photographs, schematics, and exhibits. *Id.* § 2.1033(b)(5), (7), (11).

Once the carrier has spectrum rights and an approved handset, it must complete its network by building an infrastructure to communicate with the handsets. Here, too, federal rules are extensive. Just as the FCC regulates RF emissions from mobile phones, *see, e.g.*, 47 C.F.R.

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[5] The FCC has also provided an alternate route for certification through test laboratories designated as telecommunications certification bodies ("TCBs"). *See* 47 C.F.R. § 2.960. TCBs are authorized to grant official FCC equipment authorization, but the requirements are the same regardless of submission to the FCC or a TCB.

§§ 1.1307(b), 1.1310, so too does it restrict emissions from base stations, *id.* §§ 22.913, 24.232. All equipment must be FCC certified. *Id.* §§ 22.377, 24.51. The FCC also imposes a variety of registration requirements to satisfy before deployment, *see, e.g., id.* § 17.4, and the Act establishes federal standards that limit local authority over the location of cell phone towers. 47 U.S.C. § 332(c)(7).

Of course, a wireless network is of limited use to customers if they cannot call users of other networks, so the FCC regulates interconnection between wireless networks and the facilities of local exchange carriers. *See, e.g.*, 47 C.F.R. § 20.11. FCC rules likewise govern roaming between the mobile networks of different carriers. *See id.* § 20.12(c).[5]

When a carrier has spectrum, an approved phone, and a built-out, interconnected, and duly registered network in place, it is ready to serve customers in a relationship that is also supervised by federal rules. The FCC regulates 911 service, *see, e.g.*, 47 C.F.R. § 20.18; number portability (i.e., allowing customers to keep their phone numbers when changing carriers), *see, e.g., id.* § 52.31; disability access, *see, e.g., id.* § 6.1(b)(1); use of proprietary customer information by carriers, *see* 47 C.F.R. Pt. 64, Subpart U; and billing, *see, e.g.*, 47 C.F.R. § 64.2401. Carriers must ensure law enforcement access to certain data. *Id.* §§ 22.1100, 24.900. They must contribute to funds supporting universal service. *Id.* § 54.706. And if they decide to leave the business and transfer their licenses, they must first obtain FCC approval. 47 U.S.C. § 310(d). Finally, wireless service providers are under a statutory duty to ensure that their "charges, practices,

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[5] The requirements described above are by no means exhaustive. For example, carriers are also subject to a variety of federal registration and reporting requirements. Carriers must register with the FCC before providing service. *Id.* § 64.1195. They must likewise obtain FCC authorization before providing international service. *Id.* § 63.18. Applicable reporting obligations range from notifying the FCC of network outages, *see id.* § 4.9(e), to annual international traffic figures, *id.* § 43.61, to employment data, *id.* § 1.815.

classifications, and regulations for and in connection with [their] communications service[s] shall be just and reasonable." 47 U.S.C. § 201(b); *see also* 47 U.S.C. § 332(c)(1) (declaring that wireless service providers are common carriers).

It simply cannot be said that this comprehensive regulation of the wireless industry does not qualify as a "significant federal presence."

II. STATE RF REGULATIONS WILL DESTABILIZE THE WIRELESS INDUSTRY AND HARM MOBILE SERVICE

The panel majority's refusal to follow *Locke* set the stage for its failure to appreciate the conflict between local and national rules presented by this case. By ignoring the comprehensive federal regulation of wireless service, the panel failed to consider the destabilizing consequences of its holding to the wireless industry and its customers. The wireless industry could not function if every federal rule were open to supplementation by local regulators or juries. This is particularly true of regulations affecting RF emissions. Permitting each state to decide for itself how much RF emissions are too much, or how mobile phones should be designed and marketed, will throw the industry into disarray. State restrictions on handset emissions will produce gaps in coverage and frustrate consumers trying to use their mobile phones when traveling between states. This patchwork regime will also needlessly divert carrier resources into constructing new cell towers to compensate for reduced network coverage instead of developing the new products and services demanded by consumers. The threat of disruption to so important a component of the Nation's economy and infrastructure is reason enough for this Court to grant the petition.[7]

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[7] Indeed, the panel decision imperils a regulatory success story. Consumers have benefited greatly from Congress's decision to vest authority over wireless services with the FCC instead of the states. Pet. 8. As of December 2004, wireless carriers served over 181 million subscribers, compared to just 16 million at the end of 1993 when Congress preempted rate and entry regulation by the states, and *surpassing* the num-

1. The opinion below rests on an unworkable distinction between RF emissions from wireless handsets and emissions from wireless base stations. The panel majority held that states may regulate one, but not the other. Pet. 28; Pet. App. 40a. This ruling lacks any limiting principle that would cabin its scope to the plaintiffs' requested relief of a "headset" mandate and warnings regarding the purported dangers of wireless phones. The central premise of the litigation is that RF emissions from wireless phones are too high. Nothing in the Fourth Circuit's approach will prevent future plaintiffs from demanding alternative, and even more costly, forms of relief, such as antennae redesign, device shields, or an order to reduce RF emissions.

Moreover, the panel's dichotomy between wireless telephones and their network of base stations is untenable as a practical matter. Wireless telephony involves constant, two-way interactions between handsets and base stations. A mobile phone is useless if it cannot reach the local network. As the FCC has repeatedly recognized, a network's range therefore depends on the transmitting power of *both* handsets and base stations. Each is equally important in determining where mobile telephones will work. Memorandum Opinion and Order, *Amendment of the Commission's Rules to Establish New Personal Communications Services*, 9 FCC Rcd 4957, 5025 ¶ 173 (1994).[5] Accordingly, when the

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ber of traditional landlines in service. *See Local Telephone Competition: Status as of December 31*, FCC Wireline Competition Bureau Report 1 (rel. July 8, 2005), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0705.pdf; *Trends in Telephone Service*, FCC Wireline Competition Bureau Report, Table 11.1 (rel. June 21, 2005), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend605.pdf.

[5] *See, e.g.*, Notice of Proposed Rulemaking, *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, 18 FCC Rcd 20802, 20830 ¶ 52 (2003) ("*Rural NPRM*") ("[S]imply guaranteeing that a mobile unit can 'hear' the base station, however, is not sufficient for two-way communications. . . . [t]he base station must be able to 'hear' the mobile unit."); Report and Order and Further Notice of Pro-

FCC established permissible handset power levels, it balanced the importance of coverage against any potential health and safety effects of RF emissions. *Id.* at 5025 ¶ 174 (declining to raise permitted power levels for portable units in order to limit RF exposure and interference).

Permitting state regulators, be they utility commissioners or local juries, to rebalance these considerations will disrupt service. Wireless carriers have designed and deployed their networks of base stations to accommodate the FCC's RF regulations. In fact, carriers typically strive to keep handset emissions as low as possible, even below federal limits, in order to maximize battery life and minimize interference. Theodore S. Rappaport, *Wireless Communications: Principles and Practice* 76-77 (2d ed. 2002).[9] Requiring carriers to reduce RF emissions further cannot help but create gaps in network coverage where handsets cannot reach the nearest base station. *Rural NPRM*, 18 FCC Rcd at 20830 ¶ 52 ("[A]t the fringe of the base station coverage area, the most significant limiting factors to two-way transmissions are the power level and the location *of the mobile unit*." (emphasis added)). These gaps in coverage will be especially problematic in rural areas, where carriers space their cells more widely than in more densely populated cities and towns. The panel decision thus undermines the Nation's policy of promoting wireless deployment in less densely populated regions. *Id.* ¶ 1.

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posed Rulemaking, *Extending Wireless Telecommunications Services to Tribal Lands*, 15 FCC Rcd 11794, 11810 ¶ 43 (2000) ("[I]ncreasing the base-to-mobile range of wireless base stations through height and power increases does not necessarily facilitate the provision of service, because this may require a corresponding increase in power . . . of mobile units to achieve the same mobile-to-base range.").

[9] *See also* Report and Order and Further Notice of Proposed Rulemaking, *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, 19 FCC Rcd 19078, 19130-19131 ¶ 93 (2004) ("*Rural R&O*") ("Today's handsets generally utilize low power in order to comply with our RF safety rules and to extend battery life.").

Allowing state rules that effectively set local RF emissions levels will lead to networks with dramatically reduced capabilities. It will mean more limited wireless service inside buildings. Rappaport, *supra*, at 157-66 (summarizing data on signal loss inside buildings). It will mean less effective wireless data services (such as mobile e-mail or Internet access), whose transmission speed is affected by signal strength. Lawrence Harte, *Introduction to EVDO: Physical Channels, Logical Channels, Network and Operation* 13, 23 (2004). Such rules therefore will undermine the federal policy of promoting the next generation of advanced services. *See, e.g.*, Second Report and Order, *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, 17 FCC Rcd 23193 (2002).

The economic consequences of disparate state RF and equipment mandates will spread beyond any one state's borders. The telecommunications industry is characterized by strong network effects. Each additional subscriber to a wireless network increases the network's value for all users. *Rural NPRM*, 18 FCC Rcd at 20807 ¶ 8 ("[N]etwork externalities occur when adding a user to a communications network increases the value of the network for existing users who wish to communicate with that new user."). Capturing these benefits is a driving force behind the federal policy of encouraging ubiquitous wireless service deployment, even in hard-to-serve rural areas. "[I]t is an especially important Commission goal to facilitate access to service broadly not just in urban markets but also in rural areas, to enable Americans who travel, reside or conduct business throughout the country to communicate effectively for the benefit of the general public interest." *Id.* at 20807-20808 ¶ 8. Just as policies that facilitate wireless service add value for all consumers, so too do policies, such as RF restrictions, that limit network coverage reduce such value.

2. Differing RF rules from one state to the next will also undermine the interoperability of wireless phones.

From the dawn of the cellular era, federal policy has sought to ensure that mobile phones are capable of working when they are taken from one state to the next.[10] In addition to providing consumers with better service, interoperability lowers prices by providing equipment manufacturers with a broader potential market.[11] Reliably "ubiquitous and seamless coverage" is now a consumer expectation that carriers strive to meet. *Rural NPRM*, 18 FCC Rcd at 20804 ¶ 2.

Regulatory uniformity may be unnecessary for some consumer products to work. Not so with mobile phones, which depend on a network of base stations. Underpowered handsets designed to conform to restrictive local RF requirements cannot help but experience coverage gaps when taken into states lacking such regulations.[12] Here, too, the effect will be most acute where carriers use larger cells to provide coverage. Likewise, citizens of states that decline to supplement federal RF rules may find that their phones are illegal when taken to a state with a lower RF ceiling or more restrictive design rules. In either case, the interoperability that is the goal of federal policy will be lost.

Reduced interoperability will reduce incentives for carriers to market services nationally, lest they be unable to

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[10] Report and Order, *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, 86 F.C.C.2d 469, 503 ¶ 79 (1981) ("Throughout the cellular proceeding an essential objective has been for cellular service to be designed to achieve nationwide compatibility. . . . [A] cellular subscriber traveling outside of his or her local service area should be able to communicate over a cellular system in another city.").

[11] *Id.* ("Nationwide compatibility is also likely to increase the number of manufacturers providing the cellular equipment. This price and product competition should benefit the consumer through lower equipment costs and greater equipment selection.").

[12] This is therefore not one of those cases in which the "limited extraterritorial effect" of a state regulation may preserve it from preemption. *Locke*, 529 U.S. at 112.

deliver a uniform service.[13] At times, offering a standard product will be impossible. For example, one state's jury may require headsets for mobile phones in order to minimize RF levels around the head. Another jury may forbid such headsets in order to minimize RF levels near the waist—which is where the phone would normally be held when using a headset like those demanded by Respondents. Pet. 13. If states chop up the market into a checkerboard of competing requirements, service providers will lose the economies of scale that are attainable in a national market.[14] Prices will rise as a result.

Alternatively, carriers and manufacturers may try to maintain a national and regional presence notwithstanding varying local entry rules. If so, the inevitable result will be a regulatory "race to the bottom." Carriers and manufacturers promoting nationally interoperable services and devices will try to provide phones that satisfy the requirements of all jurisdictions. They will design and market around the requirements of the state with the most restrictive RF regulations. The most burdensome RF rules will effectively set national policy, ousting the FCC of its congressionally mandated role as the authority over RF emissions.

3. The Fourth Circuit's embrace of local RF-based entry rules injects profound uncertainty into wireless network design and deployment. Section 332(c)(7) of the Act prohibits local authorities from "regulat[ing] the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions." 47 U.S.C. § 332(c)(7)(B)(iv). Yet the Fourth Circuit would effectively permit localities to do just

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[13] Rules that increase the costs of service in any one state will have the same effect by increasing the difficulty of offering a national "one-rate" plan.

[14] The situation for customer care centers will likewise be untenable as their advice to callers on phone operation will have to be tailored to the decisions of local juries rather than national rules. Widespread consumer confusion is the likely result.

that. As explained above, RF emissions from base stations and handsets are two sides of the same coin; both determine where a mobile phone will work. Lower-power phones mean smaller cells. Smaller cells mean more base stations if carriers are to maintain the quality of service that they have promised their customers. A state rule requiring handsets to reduce RF emissions is therefore indistinguishable from a mandate that carriers build and deploy more base stations.[15]

Building more base stations is hardly a simple solution. Cost is the first factor. The wireless industry already invests billions of dollars annually to improve network infrastructure and service for its customers. A Fourth Circuit-spurred building boom would needlessly divert resources to accommodate the demands of local regulators rather than customers. Of course, if carriers build these stations, providing service will become less economical, particularly in rural areas, *see Rural R&O*, 19 FCC Rcd at 19128 ¶ 88, leading to higher prices and reduced consumer choice.

The costs at issue extend beyond transmitter equipment and real estate. Base stations are typically deployed as transmitters atop towers. Building these towers is not easy. First, the range of permissible locations is constrained by demands of network design. In a cellular architecture, each base station is assigned certain radio frequencies for use in a given area, or cell. The range of each cell is defined, in turn, by the geographic area reached by radio signals emanating from the base station. To maintain full coverage, base stations must be located at or near the center of their assigned cell. *See* Rappaport, *supra*, at 59. By carefully spacing cells, a carrier may provide coverage in a manner that minimizes

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[15] This is another reason the Fourth Circuit erred in not finding the Respondents' claims preempted. *See Bastien* v. *AT&T Wireless Servs., Inc.*, 205 F.3d 984, 988 (7th Cir. 2000) ("The [Communications Act] makes the FCC responsible for determining the number, placement and operation of the cellular towers and other infrastructure.").

or eliminates gaps in coverage.[16] *See id.* at 58. Carrier choices of tower location are therefore limited.

Second, federal requirements further constrain location choices. Environmental effects must be considered, *see, e.g.*, 47 C.F.R. § 1.1307 (setting forth requirements for preparing detailed environmental assessments), as well as potential effects on historic sites of state or tribal interest, *see* Report and Order, *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, 20 FCC Rcd 1073 (2004). The FCC is also investigating the impact on migratory birds of collisions with cell towers. Notice of Inquiry, *Effects of Communications Towers on Migratory Birds*, 18 FCC Rcd 16938 (2003). Forcing carriers to build more towers than is absolutely necessary for efficient network management increases the potential for conflict with these federal policies.

Third, once a location is found that meets the first two conditions, carriers often face intense local opposition based on familiar "not-in-my-backyard" reactions. Oftentimes, the same groundless allegations of danger from mobile phones that are at the heart of the current litigation play a role in tower disputes. David W. Hughes, *When NIMBYs Attack: The Heights to Which Communities Will Climb to Prevent the Siting of Wireless Towers*, 23 J. Corp. L. 469, 495 (1998).

Section 332(c)(7) is intended to prevent local authorities from impeding carrier efforts to deploy towers. They may not "unreasonably discriminate" among similar service providers, 47 U.S.C. § 332(c)(7)(B)(i), prohibit or effectively prohibit the provision of personal wireless services, *id.*, unreasonably delay in acting on a request for authorization, *id.* § 332(c)(7)(B)(ii), deny applications unless the denials are in writing and supported by substantial evidence in the written record of proceedings, *id.* § 332(c)(7)(B)(iii), or regulate

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[16] Because network design decisions—including tower spacing—are made to reflect existing FCC rules, RF reductions that lead to gaps in coverage will likely require additional towers across the network, and not in isolated patches.

placement based on the effects of RF emissions, *id.* § 332(c)(7)(B)(iv). Despite these rules, the *Federal Reporter* and *Federal Supplement* are filled with examples of egregious actions by local authorities that forced carriers to seek a remedy in federal court. Many cases "follow an all too familiar pattern. A wireless provider submits an application to extend its cellular coverage in a locality, only to be confronted with politically motivated, interminable, delays and ineffectual excuses by local officials for their failure to act on the application in a timely fashion." *Omnipoint Commc'ns, Inc.* v. *Village of Tarrytown*, 302 F. Supp. 2d 205, 225 (S.D.N.Y. 2004).[17]

If the panel majority's decision stands, these collisions between local and federal law will only increase. Failure to grant the petition thus threatens the ironic consequence of heightening the conflict between state and federal interests that the panel majority tried and failed to reconcile.

III. Disparate State RF Regulation Threatens The Reliability Of Public Safety Communications

Congress enacted the Communications Act "for the purpose of the national defense [and] for the purpose of promoting safety of life and property through the use of wire and radio communications." 47 U.S.C. § 151. The FCC is trying to advance these goals through regulations designed to promote 911 services for citizens and robust communications capabilities for public safety officials. The decision below undermines both national policies by permitting states to interject themselves into issues of RF regulation.

1. A telephone is never more valuable than in an emergency. Accordingly, promoting access to 911 service is a longstanding federal policy. Just last year, Congress reaf-

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[17] *See also, e.g., Telespectrum, Inc.* v. *Public Serv. Comm'n of Ky.*, 227 F.3d 414, 424 (6th Cir. 2000); *Omnipoint Holdings, Inc.* v. *Town of Westford*, 206 F. Supp. 2d 166, 172 (D. Mass. 2002); *Nextel Partners, Inc.* v. *Town of Amherst*, 251 F. Supp. 2d 1187, 1194-1195, 1201 (W.D.N.Y 2003).

firmed the importance of broad 911 availability "for the sake of our Nation's homeland security and public safety." ENHANCE 911 Act of 2004, Pub. L. 108-494, § 102, 118 Stat. 3986, 3986.

To ensure the universal availability of 911 services, the FCC has issued rules directing that wireless phones be connected to the emergency 911 network. Report and Order and Further Notice of Proposed Rulemaking, *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 11 FCC Rcd 18676 (1996). Providing wireless 911 service posed, and continues to present, daunting technical challenges. Even basic 911 service, which simply connects wireless calls to a public safety answering point ("PSAP"), is complicated. Customers may not be in their carrier's network when dialing 911, and the local carrier may use different technology to provide service. *Id.* at 18680 ¶ 7. Despite these challenges, almost all carriers, wireless and wireline alike, provide basic 911 service today. 47 C.F.R. §§ 20.18(b), 64.3001, 64.3002; First Report and Order and Notice of Proposed Rulemaking, *E911 Requirements for IP-Enabled Service Providers*, 2005 WL 1323217, ___ FCC Rcd ___ ¶ 8 (2005).

State regulations that limit the power of mobile phones threaten to roll back this progress. Wireless phones that cannot reach the nearest tower are useless for 911 purposes. The importance of these considerations cannot be overstated. Americans make 200 million 911 calls per year. *Id.*, 2005 WL 1323217, ¶ 6. About one third of these calls are made from wireless phones. Fact Sheet, *Wireless 911 Services*, FCC Consumer & Governmental Affairs Bureau, *available at* http://www.fcc.gov/cgb/consumerfacts/wireless911srvc.html (last visited Oct. 3, 2005). State regulations, however well-intentioned, that leave parts of the country without wireless coverage undermine federal policies designed to promote 911 service.

2. State RF regulations also endanger federal efforts to promote enhanced 911 ("E911") service. Basic 911 service does not automatically provide the PSAP with the caller's

location. This information is necessary when stress, duress, or an unfamiliar setting prevents a caller from telling emergency operators where he or she is. E911 service addresses this problem by automatically providing the PSAP with the caller's phone number and location. The FCC's 911 regulations require wireless carriers to offer E911 capability. Phase I of these rules requires that wireless phones be able to send the telephone number of a 911 caller as well as the location of the cell site or base station receiving the call. 47 C.F.R. § 20.18(d). Phase II, which is currently under implementation, requires that the specific location of the caller be transmitted. *Id.* § 20.18(e).

E911 is not a technical challenge for traditional wireline phones, which have a fixed location that can be automatically associated with the caller's phone number. In contrast, automatically providing location data from a wireless phone is difficult given the phone's mobility. Wireless carriers have developed a variety of technical solutions to the problem. Some carriers rely on multiple receivers within their networks. These receivers detect the caller's signal and then use triangulation to determine the caller's precise location. An alternative approach is to use GPS technology located within the mobile phone itself to determine location. *See generally* FCC Amended Report to Congress on the Deployment of E-911 Phase II Services by Tier III Service Providers: Submitted Pursuant to Public Law No. 108-494, at 7-10 (Apr. 1, 2005) (describing various methods), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-79A1.pdf.

State rules limiting RF emissions will frustrate E911 deployment. Of course, where emissions restrictions create coverage gaps, no 911 call will be possible in the first place (making the question of transmitting location information moot). Local RF restrictions will also limit E911 availability for carriers using network-based technology. This technology cannot locate the user unless *multiple* locations are able to detect the handset's signal. Establishing a link with the nearest base station is not enough; the signal must be strong

enough to reach additional receivers for the necessary triangulation. Under the panel majority's rule, however, E911 service will forever be at the mercy of an ill-timed jury decision. A shift in local policy could reduce handset power and limit E911 availability until expensive new receiving stations are built, if not indefinitely.[18]

The dangers described here are heightened by the fact that the provision of E911 presents challenges beyond selecting the proper wireless location technology. Effective E911 demands coordination among wireless carriers, their equipment providers, and approximately 8,000 PSAPs nationwide. Full E911 deployment requires differing carrier technologies using multiple RF bands to interact with existing wireline 911 technology that is in many cases aging or outdated. Dale N. Hatfield, *A Report on Technical and Operational Issues Impacting the Provision of Wireless Enhanced 911 Services* 18-19, *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513296239 (last visited Oct. 3, 2005). In light of the technical and structural challenges involved, the development of wireless E911 services has been a long process since the FCC issued its first order in 1996. As it is, many carriers are struggling to meet Phase II timetables. *See, e.g.*, Order, *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 20 FCC Rcd 7709 (2005) (evaluating requests for extension of E911 deadlines). Interference from local tort actions will only increase these difficulties.

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[18] Local RF restrictions will also undermine handset-based solutions. In rural areas, handset-based E911 deployment is already slowed by the reluctance of subscribers to trade in higher powered analog phones for lower powered, but E911-enabled, substitutes. *See* National Association of Regulatory Utility Commissioners, *Resolution Regarding the Suspension or Waiver of the December 31, 2005 Deadline for 95 Percent Penetration of Location-Capable Handsets* (adopted July 27, 2005), *available at* http://www.naruc.org/associations/1773/files/LocationCapableHandsets_s0705.pdf. Limitations on RF emissions that further limit the range of new phones can only exacerbate this dynamic.

3. The FCC has recognized that "[t]he Homeland Security obligations of the Nation's public safety agencies make it imperative that their communications systems are robust and highly reliable." Report and Order, *Improving Public Safety Communications in the 800 MHz Band*, 19 FCC Rcd 14969, 14971 ¶ 1 (2004) ("*Public Safety Order*"). Recent natural disasters have only reinforced the truth of this observation. But public safety officials may find their ability to communicate hampered by the development of local RF standards or operational requirements.

First, public safety providers frequently use consumer devices, and the wireless industry has worked closely with local and national authorities to ensure that wireless networks are available in emergencies. At the federal level, the industry has engaged in cooperative efforts with the Department of Homeland Security's Wireless Priority Service. This service ensures that key personnel will have priority access to a portion of the wireless network during emergencies even if the networks are congested. *See generally* http://wps.ncs.gov/; 47 C.F.R. § 64.402. Local policies that decrease the reach or reliability of public networks therefore limit the Nation's emergency communications capability.

Second, equipment designed specifically for use by public safety providers is also subject to FCC RF limits. State-by-state second-guessing of these standards therefore creates the same potential for coverage gaps and reduced interoperability in public safety networks that it creates with respect to consumer devices. Indeed, public safety devices tend to operate at higher power levels than do their civilian counterparts, as they tend not to be deployed in a cellular architecture and thus cover larger areas. *Public Safety Order*, 19 FCC Rcd at 14972 ¶ 2. They are therefore more vulnerable to the effects of restrictive policies. Once again, the consequences will extend beyond any one state's borders. If public safety communications equipment is not interoperable across state lines, interstate deployment of personnel in emergencies will likely be hampered.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 05-198

IN THE

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NOKIA, INC., ET AL.,

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v.

GARRETT NAQUIN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* THE AMERICAN NATIONAL STANDARDS INSTITUTE, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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CASES — Page

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STATUTES

15 U.S.C. § 2056 7
29 U.S.C. § 655(a) 7
Pub. L. No. 104-113, §12, 110 Stat. 775 (1995) ... 6, 12
Pub. L. No. 104-191, § 262, 110 Stat. 2021 (1996) 7
Pub. L. No. 104-204, § 704(b), 110 Stat. 56 (1996) 2, 3

ADMINISTRATIVE MATERIALS

Department of Commerce, *Standards and Competitiveness, Coordinating for Results* 12 (2004) 12
Federal Communications Commission, *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 11 F.C.C.R. 15123 (1996) 3, 10
National Institute of Standards and Technology, Department of Commerce, *Eighth Annual Report on Federal Agency Use of Voluntary Consensus Standards and Conformity Assessment* (2004) 6
National Institute of Standards and NTTAA Technology, Department of Commerce, *NTTAA: Frequently Asked Questions, available at* http://ts.nist.gov/ts/htdocs/210/nttaa/nttaa-qa.htm 11

TABLE OF AUTHORITIES—Continued

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Office of Management and Budget, Executive Office of the President, OMB Circular A-119, *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*, 63 Fed. Reg. 8,545 (Feb. 19, 1998) 13

LEGISLATIVE MATERIALS

H. R. Rep. No. 104-204 (1995) 3, 11

Representative George E. Brown, Jr., Statement, 142 Cong. Rec. H1266 (daily ed. Feb. 27, 1996) 7

Senator Rockefeller, Statement, 142 Cong. Rec. S1078 (daily ed. Feb. 7, 1996) 13

MISCELLANEOUS

ANSI, *ANSI Auditing Policy and Procedures* (2005), *available at* http://public.ansi.org/ansionline/Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/ 4

ANSI, *National Standards Strategy for the United States*, (2000) *available at* http://www.ansi.org/standards_activities/nss/nss.aspx?menuid=3#1 11

ANSI, *Procedures for Management and Coordination of American National Standards* (1974) *available at* http://public.ansi.org/ansionline/Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/ANS%20Procedures%20-%20 Historical/ANSIPR01974.pdf 5

TABLE OF AUTHORITIES—Continued

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ANSI, *ANSI Essential Requirements: Due process requirements for American National Standards, available at* http://www.ansi.org/about_ansi/introduction/introduction.aspx?menuid=1 6

ANSI, Constitution and Bylaws, (January 2005), *available at* http://public.ansi.org/ansionline/Documents/About%20ANSI 5

B. Blake Levitt, *Electromagnetic Fields* (Harcourt Grace & Co.) (1995) 8

Gregory Tassey, National Institute of Standards and Technology, *Standardization in Technology-Based Markets* (n.d.) 12

J.M. Osepchuk & R.C. Petersen, *Historical Review of RF Exposure Standards and the International Committee on Electromagnetic Safety (ICES)*, 6 Bioelectromagnetics Supplement S7 (2003) 8, 11, 14

Joseph Farrell & Garth Saloner, *Coordination through Committees and Markets*, 19 Rand J. Econ. 235 (1988) 11

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the American National Standards Institute, Inc. ("ANSI"), respectfully submits this brief in support of Petitioners.[1] ANSI is a private, non-profit organization that

[1] Pursuant to Supreme Court Rule 37.2(a) *Amicus Curiae* certifies that this brief is filed with the written consent of all parties; those consents have been lodged with the Clerk of the Court simultaneously with the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amicus curiae* also certifies that no counsel for either party authored the brief in whole or in part, and that no person or entity, other than *amicus curiae* and its

administers the voluntary standardization and conformity assessment system in the United States. ANSI is not responsible for developing the technical content of standards. Instead, it is the accreditor of voluntary consensus standards-developing organizations ("SDOs") and many of the standards they develop. ANSI accreditation signifies that the procedures SDOs use when developing a standard meet ANSI's essential requirements for due process.

Amicus Curiae files this brief because of its strong interest in protecting the U.S. system of consensus standards and the federal government's reliance on that system. The *Naquin* Plaintiffs-Respondents argue that their cellular telephones, all of which comply with Federal Communications Commission ("FCC") radiofrequency ("RF") testing and emission standards and regulations, are nonetheless unsafe. The FCC standards at issue are based in part upon standards developed using ANSI's procedures, which ANSI approved.

Participation of *Amicus Curiae* will assist the Court in understanding the development of the ANSI standards that the FCC adopted. It also will aid the Court in understanding why allowing lay juries to revisit the technical merit of the standard in the context of piecemeal state court litigation is both bad law and bad policy. There is no doubt that Congress charged expert federal agencies, led by the FCC, with developing the proper balance among the policy interests encompassed within the Telecommunications Act of 1996, Pub. L. No. 104-204, § 704(b), 110 Stat. 56. The FCC's reliance on ANSI standards was consistent with the policy of both the Congress and the Executive Branch to partner with properly accredited national standard-setting bodies to achieve cost-efficiency and the optimal result in regulatory action based on scientific consensus. The Fourth Circuit

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counsel, made any monetary contribution to the preparation or submission of this brief.

decision opens the door to state court attacks on such federal regulatory standards and on the standard-setting bodies themselves, many of whom are increasingly named in class action lawsuits as part of an alleged "civil conspiracy." Allowing such suits to go forward will lead to public confusion on scientific issues, will undermine public confidence in any technical standard, and will have a chilling effect on the congressionally mandated partnership between federal agencies and the voluntary consensus standards community.

SUMMARY OF THE ARGUMENT

In the Telecommunications Act of 1996, Congress mandated FCC adoption of a national standard for radiofrequency emissions that addressed two policy interests: protection of the public health and safety, and rapid deployment of a competitive wireless telecommunications system. Pub. L. No. 104-204, § 704(b), 110 Stat. 56 (1996); H. R. Rep. No. 104-204, at 94 (I) (1995). The FCC adopted a standard that achieved these objectives through the collaboration of multiple federal agencies and the consensus of the voluntary standards community. *See Guidelines for Evaluating the Envtl. Effects of Radiofrequency Radiation*, 11 F.C.C.R. 15123, 15123 ¶2 (1996) ("FCC First Order"). It is unlikely the Respondents could obtain a superior result in effectuating this legislative mandate through piecemeal tort litigation.

ANSI urges this Court to uphold the preemptive force of technical standards developed in an open manner, respectful of due process, through which the consensus of federal agencies, experts and other interested persons was achieved. Denying the preemptive force of such standards will impose on judges or juries the unenviable task of re-evaluating the validity of the standards within the confines of state court litigation. Such an approach would upset the delicate balance of interests the FCC selected for a technology that transcends state and even international boundaries. It also destabilizes

the existing framework within which national technical standards are developed with broad participation and expert input.

The establishment of a multitude of inconsistent or conflicting standards by lay judges and juries presented with limited evidence will negatively impact the availability of a competitive wireless telecommunications system in the United States. And, allowing a patchwork of standards will defeat the voluntary consensus standardization system that Congress has directed remain an integral part of the federal regulatory process.

ARGUMENT

I. THE FCC STANDARDS REFLECT A HISTORY OF COLLABORATION AND CONSENSUS OF SCIENTIFIC EXPERTS AND FEDERAL AGENCIES.

A. ANSI's system of consensus standards has long provided a strong basis for federal regulation.

A standard is a document, established by consensus of subject matter experts and approved by a recognized body, which provides rules, guidelines or characteristics for a product for common and repeated use. Manufacturers need standards to determine the performance requirements for products they design, make and sell, and they need test procedures to assess conformity to those requirements. Purchasers and users rely on established standards to select the products appropriate for their needs. Standards exist across many industries, including telecommunications, information processing, safety and health, petroleum, medical devices, and more. *See* ANSI, *ANSI Auditing Policy and Procedures* (2005), *available at* http://public.ansi.org/ansionline/Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/.

In the standards community, one of the more familiar names is ANSI, though ANSI's role is frequently misunderstood. Founded in 1918 as the American Engineering Standards Committee, ANSI began as a federation of several prominent standards-developing organizations. ANSI continues today as the coordinator of the voluntary[2] consensus standards system in the United States. ANSI has served in this capacity for more than eighty years.

ANSI does not develop standards itself. *See* ANSI, Constitution and Bylaws, art. 1, § 1.03 (January 2005), *available at* http://public.ansi.org/ansionline/Documents/About%20ANSI. Instead, it coordinates the activities of organizations in the U.S. that develop standards, and provides a neutral forum for the development of policies on standards issues. To that end, ANSI accredits both standards-developing organizations, and the standards themselves, provided the accredited developer demonstrates adherence to certain procedures. Open participation, due process and consensus are necessary for ANSI accreditation.

Since 1974, the ANSI Board of Standards Review ("BSR") has been responsible for approving standards as American National Standards ("ANSs") and hearing any appeals regarding them. *See* ANSI, *Procedures for Management and Coordination of American National Standards* (1974) *at* http://public.ansi.org/ansionline/Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/ANS%20Procedures%20-%20Historical/ANSIPRO1974.pdf.

The BSR carefully reviews the standards SDOs submit that have unresolved objections on the record. Unresolved objec-

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[2] "Voluntary" refers only to the manner in which the standard was developed; it does not necessarily refer to whether compliance with a consensus standard is optional or whether a government entity or market sector has endorsed the document for mandatory use.

tions include both negative votes from within the SDO *and* public review comments. The BSR's approval of a standard is based on evidence the SDO provides of its procedural compliance—including openness, lack of dominance, balance, notice, consideration of objections, consensus, and internal appeals—not on a review of the technical content of the document. *See ANSI Essential Requirements: Due process requirements for American National Standards, available at* http://www.ansi.org/about_ansi/introduction/introduction.aspx?menuid=1. Without evaluating the technical content, the BSR considers whether the standard is generally contrary to the public interest, contains unfair provisions or is unsuitable for national use before approving it as an ANS. This basic formula has been the hallmark of ANSI's process for decades, and it has garnered world-wide respect.

B. The federal government recognizes the value of consensus standards and the expertise of organizations developing them.

The National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, §12, 110 Stat. 775, 782-783 (codified as amended in 15 U.S.C. § 272 (1996)) ("NTTAA"), requires federal agencies to rely upon—and participate in—the consensus standards and conformity assessment systems. *See* Nat'l Institute of Standards and Technology, Dep't of Commerce, *Eighth Annual Report on Federal Agency Use of Voluntary Consensus Standards and Conformity Assessment* 1 (2004) ("Federal agencies continue to look overwhelmingly to the private sector to fulfill government needs rather than creating new government-unique standards."). Congress adopted this policy, having concluded that consensus standards "are developed with great care and expertise in an open, democratic manner which makes U.S. voluntary standards the envy of the world . . . [t]hese groups are better equipped than the Government to understand all points of view and to keep up with the state of the art in technical standards." 142

Cong. Rec. H1266 (daily ed. Feb. 27, 1996) (Statement of Rep. Brown).

NTTAA has led to an increase in governmental use of private sector standards, but Congressional support for the use of consensus standards is not unique to NTTAA. *See, e.g.*, 15 U.S.C. § 2056 (2000) (requiring the Consumer Product Safety Commission to rely upon voluntary consensus consumer product safety standards rather than promulgating its own standards); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 262, 110 Stat. 2021 (codified at 42 U.S.C. § 1320d) (requiring the Secretary of Health and Human Services to adopt standards developed by ANSI-accredited standards developers whenever possible); 29 U.S.C. § 655(a) (1972 Occupational Safety and Health Act provision requiring use of national consensus standards for initial occupational safety and health standards). ANSI and the system of voluntary consensus standards are integral to the work of regulatory agencies.

C. The ANSI standards adopted by the FCC were developed in an open, balanced, consensus-based manner, with an opportunity for appeal.

By requiring due process and the right to appeal at several levels of review, ANSI has established widespread confidence in, and credibility for, the standards it accredits. The standards at issue in this litigation[3] are prime examples of the fruits of this process. The committees and subcommittees that developed the C95 standards are recognized for their open, transparent, and consensus-based process throughout their extensive history.

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[3] The FCC's radiofrequency testing, certification, and emission standards at issue involve two of the C95 standards, C95.1, which identifies safe levels of human exposure to RF emissions, and C95.3, which establishes compliance testing requirements. *Amicus* will refer to these collectively as the "C95 standard" throughout this brief, unless otherwise noted.

The initial C95 standards were based on a collective research effort of the military, university researchers, and engineers. The origins of the C95.1 standard date back to the early 1940s when the U.S. Navy's Bureau of Ships directed the Naval Research Laboratory to research the biological effects of exposure to microwave radiation. B. Blake Levitt, *Electromagnetic Fields* 20 (Harcourt Grace & Co.) (1995). During the 1950s, the U.S. Air Force became involved, and both the Air Force and the Navy sponsored a significant amount of research into the biological effects of microwaves. In 1957, the Department of Defense asked the U.S. Navy's Bureau of Ships to conduct testing on the effects of personnel exposure to microwaves. *Id.* at 23-24.

Shortly thereafter, ANSI's predecessor, the American Standards Association ("ASA") approved the initiation of its Radiation Hazards standards project. *Id.* at 24. The Department of the Navy and the American Institute of Radio Engineers (now the Institute of Electrical and Electronics Engineers or "IEEE"), cosponsored the project, and established USASI Committee C95, which subsequently became ANSI Committee C95. *Id.* A University of Pennsylvania biophysicist chaired the committee that was charged with developing radiofrequency and microwave safety standards through an open, consensus-based process. *Id.* at 22.

The C95 Committee published its first recommendations for RF and microwave exposure in 1966, now referred to as ANSI C95.1-1966. *Id.* at 25. As the state of the art evolved, the committee published revisions in 1974 and in 1982. J.M. Osepchuk & R.C. Petersen, *Historical Review of RF Exposure Standards and the International Committee on Electromagnetic Safety (ICES)*, 6 Bioelectromagnetics Supplement S7, S8 (2003). IEEE and the U.S. Navy still cosponsored the committee at this time.

IEEE became an ANSI-accredited standards developing organization in 1982. In 1990, the ANSI C95 committee was

converted to Standards Coordinating Committee 28 ("SCC 28") under the sole sponsorship of the IEEE Standards Board. C95 standards were then issued and developed as IEEE standards under IEEE rules and policies, and submitted to ANSI for recognition and approval.

Consistent with both ANSI and IEEE commitments to an open and balanced consensus process, IEEE Subcommittee 4, tasked with revising the C95.1-1982 standard, was comprised of individuals from a cross-section of interests. These included members from the Food and Drug Administration, the Naval Aerospace Medical Research Laboratory, the Occupational Health and Safety Administration, the Environmental Protection Agency, the U.S. State Department, universities, industry, trade associations and public interest groups. By 1990, the Subcommittee had more than 120 members that participated in voting on the standard.

While the C95 subcommittee began the process of revising the 1982 standard in 1984, IEEE did not approve C95.1 until September 1991. The standard at that time was nearly nine years in the making, the fruit of countless hours of debate by individuals with expertise in radiofrequency radiation and electromagnetic fields. ANSI's BSR then reviewed C95.1 on an appeal by a consulting firm for the broadcasting industry, which alleged a lack of consensus among the broadcasting industry. The BSR ultimately denied the appeal, in part because the scope of the standard covered general public safety and was not limited to the broadcasting industry.

The system that developed the C95 standards is respected and recognized globally. The FCC evaluated and adopted, in large part, the C95 standards into its RF emission regulations. The FCC standards thus reflect not only the FCC's efforts, but also the benefit of many additional years of expert and public input into the development of the standards.

II. STANDARD-SETTING THROUGH PIECEMEAL LITIGATION NEGATES THE BENEFITS OF THE EXISTING FCC STANDARDS AND THE SYSTEM THAT DEVELOPED THEM.

A. Judicial decisionmakers lack the benefit of broad input and expertise available through agency-adopted consensus standards.

Respondents would have the Court deny the preemptive force of a federal standard that was developed in an open manner, respectful of due process, through the combined efforts of academic, industry, labor, government, trade association, and public interest representatives who achieved consensus on the technical merit of the standard after years of collaboration. In its place, Respondents urge the Court to allow multiple state court judges and juries to supplant the FCC RF emissions standard through a non-consensus-based decision-making process in which a narrow set of interested parties (generally, consumer and industry) present technical arguments to lay decisionmakers.

Respondents' position not only undermines the collaborative efforts of multiple federal agencies, *see FCC First Order, supra,* at 15124 ¶ 2, it ignores years of history during which a multitude of radiation health effects experts and affected interests reached consensus regarding the RF exposure levels established in the C95 standard. Because such a high degree of competence is required in each technical area encompassed within this standard, it is unlikely that allowing individual judges or juries to prescribe standards would achieve a superior result.

Respondents' concerns are best addressed though the existing ANSI process, in which public comments on the content of American National Standards are welcome and parties with materially affected interests can participate in their develop-

ment. *See* Joseph Farrell & Garth Saloner, *Coordination through Committees and Markets*, 19 Rand J. Econ. 235, 251 (1988) ("[C]ommittees are always desirable [for achieving coordination in the choice of technical standards.]").

B. Piecemeal standard-setting through litigation will frustrate Congress' intention of establishing a competitive wireless telecommunications service.

Regulation of RF emissions through piecemeal litigation in different states threatens the "availability of competitive wireless telecommunications services" H. R. Rep. No. 104-204, at 94 (I) (1995) achieved through the FCC's selection of a nationwide standard. Competition in both national and international markets necessitates selection of a single technical standard to ensure nationwide interoperability of portable wireless devices.

"For products, processes and services having an impact beyond the United States [such as wireless telecommunications technology, ANSI seeks] at most one globally applied standard and one globally accepted test with conformity assessment processes appropriate to the needs of the parties." ANSI, *Nat'l Standards Strategy for the United States*, 10-11 (2000) *at* http://www.ansi.org/standards_activities/nss/nss.aspx?menuid=3#1; *see also* Osepchuk & Petersen, *supra*, at S11 ("Because of the importance of uniform global standards in this area [i.e., RF emissions from wireless telecommunications technology] the subcommittee [IEEE product safety committee SCC34] was quickly populated with experts, many from outside the U.S. . . . .").

Without consensus on a single standard, U.S. consumers and business interests lose many benefits. *See* Nat'l Institute of Standards and Technology, Dep't of Commerce, *NTTAA: Frequently Asked Questions*, *at* http://ts.nist.gov/ts/htdocs/210/nttaa/nttaa-qa.htm ("Technical standards can enable or

constrain trade not only at the federal but also at the state and local levels."). When industry operates under a single technical standard, consumers receive multiple benefits, including interoperability and greater product competition. In the case of wireless communications technology, consumers are able to reliably use their telephone in any location in the country where wireless service is provided. Brief of Pet. at 17. With a single standard, industry incurs fewer transaction costs when entering a new market, enabling greater participation. Dep't of Commerce, *Standards and Competitiveness, Coordinating for Results* 12 (2004). This maximizes competition, thereby decreasing prices and potentially increasing the variety of choices available. *See* Gregory Tassey, Nat'l Institute of Standards and Technology, *Standardization in Technology-Based Markets* 2 (n.d.).

Standardization provides predictability for the producer as well, which in turn provides greater value for the consumer. A single standard allows industry to avoid the costs of developing needlessly duplicative technologies to comply with an unpredictable patchwork of standards. Dep't of Commerce, *Standards and Competitiveness, supra,* at 12. The reduction in consumer prices possible when producers are able to effectively assess and penetrate markets encourages more widespread and rapid adoption of the technology, which in turn increases producers' opportunities to take advantage of economies of scale. *See* Tassey, *supra,* at 2. The proliferation of state litigation reexamining federal standards threatens the continuation of these benefits and the availability of a competitive wireless telecommunications system in this country.

C. Use of tort litigation to set standards defeats the purpose of the public-private partnership Congress established under the NTTAA.

Standard-setting through tort litigation would frustrate Congress' requirement that federal agencies employ voluntary consensus standards when implementing federal policy, unless their use is inconsistent with applicable law or is impractical. NTTAA, Pub. L. No. 104-113, §12, 110 Stat. 775, 782-783 (codified as amended in 15 U.S.C. § 272 (1996)).

Through section 12(d) of NTTAA, Congress established as law the policies that were previously embodied in OMB Circular A-119. *See* 142 Cong. Rec. S1078-1082 (daily ed. Feb. 7, 1996) (Statement of Sen. Rockefeller). OMB adopted these policies after concluding that "standards developed by voluntary consensus standards bodies are often appropriate for use in achieving federal policy objectives and in conducting federal activities, including procurement and regulation." Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular A-119, *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*, 63 Fed. Reg. 8,545, 8,546 (Feb. 19, 1998). Among the benefits to government from the use of consensus standards are greater access to expertise in the private sector and the elimination of costs associated with developing government-unique standards. *Id.* The private sector benefits include the promotion of efficiency and competition, and hence economic growth, through harmonization of technical standards. *Id.*

Respondents would have this Court undermine this long-established partnership and its benefits. Allowing an endless procession of challenges to the FCC standard through state-law tort suits would create a disincentive for federal agencies to rely on voluntary consensus standards. Moreover, the increasing involvement of SDOs in tort litigation could deter

them from further participation.[4] Standard-setting through piecemeal litigation overrides Congress' express desire that these standards-developing entities play a *greater* role in establishing technical standards in areas where it is crucial to rely on their expertise and ability to achieve broad consensus.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and reverse the decision of the Fourth Circuit.

Respectfully submitted,

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[4] *See* Osepchuk & Petersen , *supra*, at S11 (noting the dampening effect the Court's opinion in *ASME, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), had on participation in the voluntary consensus standards community). In fact, although ANSI is not a party to this litigation, it is currently a defendant in six product liability lawsuits pending in the D.C. Superior Court, and one product liability action pending in the United States District Court for the District of Maryland, which challenge the RF emissions standards at issue in this case.

No. 05-198

IN THE

Supreme Court of the United States

NOKIA, INC., *et al.*,

Petitioners,

v.

GARRETT NAQUIN, *et al.*

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICUS CURIAE*, THE INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS, INCORPORATED, IN SUPPORT OF PETITIONER

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IEEE-SA Standards Board Operations Manual (2005), http://standards.ieee.org/guides/opman/index.html ...5, 6, 7

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INTEREST OF AMICUS CURIAE[1]

The Institute of Electrical and Electronics Engineers, Incorporated ("IEEE") is a nonprofit, educational and scientific organization founded in 1963 with the merger of the American Institute of Electrical Engineers and the Institute of Radio Engineers, Incorporated. The IEEE has more than 365,000 individual members in over 150 countries. Its mission is to promote the engineering process of creating, developing, integrating, sharing, and applying knowledge concerning electronic and information technologies and sciences for the benefit of humanity and the profession.

The IEEE produces nearly thirty percent of the world's literature in the fields of electrical and electronics engineering and computer science. The IEEE, through its IEEE Standards Association ("IEEE-SA"), is also a leading developer of voluntary national and international safety and performance standards in a variety of fields. The IEEE-SA, an unincorporated organizational unit within the IEEE, develops a wide range of consensus-based standards through a balanced, publicly open, and fair process that involves the active participation of IEEE members and nonmembers with expertise in the subject area of the affected standard.

More specifically, the IEEE, through the IEEE-SA, sponsored the development of the Radio Frequency ("RF") safety standard (IEEE Std C95.1-1991) and the recommended practice for RF measurement (IEEE Std

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[1] No party or counsel to a party has authored this brief in whole or in part, and no person or entity other than the *amicus curiae* has made any financial contribution to its preparation or submission.

Counsel of record for all parties have consented to the filing of this brief. Their letters of consent are filed separately herewith.

C95.3-1991) on which the Federal Communications Commission ("FCC") based its exposure and testing regulations that are at issue in this case. Hence, the IEEE has intimate knowledge of the painstaking interdisciplinary process that led to the adoption of those standards and the scientific evidence on which they are based. The IEEE respectfully believes that this brief will aid the Court in understanding that process and the serious harm that the decision below will cause to both the work of standards-development organizations and the public interest.

The IEEE is not a party to the case below or the companion cases in *Celco Partnership v. Pinney*, 402 F.3d 430 (4th Cir. 2005), which are the subject of a separate petition for a writ of *certiorari* in No. 05-207. The IEEE is, however, a defendant in seven other tort suits in which the plaintiffs allege that they have suffered personal injury from their use of FCC-certified hand-held cellular telephones, which plaintiffs contend are dangerous products. These suits, all of which are now pending in state or federal courts, constitute direct attacks on the IEEE and its applicable standards. The IEEE thus also has a strong interest in defending its standards-development process and avoiding being drawn into similar suits that seek to collaterally attack science-based consensus standards and substitute for them the potentially divergent and inconsistent judgments of multiple lay juries and courts.

SUMMARY OF ARGUMENT

Respondents' suit alleges that portable hand-held cellular telephones are unsafe, even though they fully comply with FCC exposure and testing regulations. This suit thus constitutes a direct attack on those regulations and on the IEEE standards on which they are based. Those standards were developed over more than an eight-year period and build upon decades of prior science-based RF exposure standards. They represent the consensus view of over 125 experts in the fields of engineering, medicine and research, drawn from academia, government and industry. The standards-development process was, and is, open, public, and painstakingly thorough, and it affords all participants and observers multiple opportunities to appeal any perceived procedural defect or substantive error or oversight.

The public is best served by health and safety standards, like those at issue, that are based on verifiable and peer-reviewed scientific data rather than on unfounded speculation and fears. The standards-development process followed by the IEEE and its predecessors ensures, to the fullest extent possible, that all relevant reports and data are properly considered and that the standard is based on the best available scientific research and studies.

The decision below would undermine that process by allowing lay persons and courts in separate jurisdictions around the country to substitute their individual judgments for the consensus judgment of widely recognized experts who have devoted most of their careers to the subject matter of the standards. Such a result is inefficient, costly, and may lead to safety standards and requirements that do not adequately protect the public. It may also deprive the government and the public of the benefits of voluntary consensus standards development. For these reasons, the

IEEE respectfully submits this case is one of exceptional importance and worthy of the Court's review.

ARGUMENT

In 1996, the FCC promulgated regulations governing the RF-exposure levels of wireless devices, include hand-held cellular telephones. 47 CFR § 2.1093 (2004). Those regulations are based on two standards developed by working groups of an IEEE-sponsored committee and approved by the American National Standards Institute ("ANSI"): *IEEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz*, IEEE Std C95.1-1991 (sometimes referred to as the "*Exposure Standard*" or "C95.1-1991"); and *IEEE Recommended Practice for the Measurement of Potentially Hazardous Electromagnetic Fields—RF and Microwave*, IEEE Std C95.3-1991 (sometimes referred to as the "*Measurement Standard*" or "C95.3-1991").[2] *See* 47 CFR § 2.1093(d) (2004). Respondents' suit constitutes a direct challenge to those regulations and to the IEEE's standards-development process. The Fourth Circuit's decision permitting such challenges is contrary to the public interest and the protection of the public safety and health. Accordingly, this case poses exceptionally important issues that merit this Court's review.

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[2] C95.3-1991 is titled a recommended practice, but it was adopted pursuant to the procedures applicable to the adoption of a standard and accordingly, for convenience, will be referred to as such herein. In 1992, ANSI approved both standards as American National Standards, and ANSI refers to them as ANSI/IEEE C95.1-1992 and ANSI/IEEE C95.3-1992 respectively. *Amici* will refer to the standards simply as C95.1-1991 and C95.3-1991 unless the context requires otherwise.

I. THE IEEE STANDARDS-DEVELOPMENT PROCESS IS BALANCED, PUBLICLY OPEN, AND AFFORDS DUE PROCESS TO ALL PARTICIPANTS AND OBSERVERS

As an ANSI-accredited Standards-Development Organization ("SDO"), the IEEE adheres to strict, published procedures designed to ensure the integrity of the standards-development process and the adoption of standards based on the broadest possible consensus of experts in the affected fields. The hallmarks of this process are openness to all interested persons, visibility to the public, and responsiveness to, and fair consideration of, all competing viewpoints, research and data.

The process of developing an IEEE standard begins with sponsorship of the project by either an IEEE Society that encompasses the scientific field of the proposed standard or a Standards Coordinating Committee ("SCC"), which encompasses a spectrum of interests and expertise broader than those of any single IEEE Society.[3] *See generally Standards Development at the IEEE Standards Association*, http://standards.ieee.org/announcements/bkgnd_stdsprocess.html (Feb. 2005) (hereinafter "*Standards Development*").

The sponsor must obtain approval from the IEEE Standards Association Standards Board ("Standards Board") for all proposed standards projects. *IEEE-SA Standards Board Operations Manual* at 12, (2005) http://standards.ieee.org/guides/opman/index.html (hereinafter "*Operations Manual*").

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[3] IEEE Societies are unincorporated units of the IEEE whose members focus on a particular field or discipline of engineering or science.

If the Standards Board approves a project, the sponsor forms a working group or groups of experts and others who are interested in the subject matter of the standard. *Standards Development*. The working group members, however, need not be members of the IEEE. Moreover, none of the members of a sponsoring group or a working group is compensated for his or her time and effort.

The working group performs the day-to-day work necessary to develop and refine the proposed standard. Working groups and working group meetings are open to the public and generally have well-publicized procedures regarding membership, voting, officers, and recordkeeping. *Id*.

The sponsor also selects a balloting group to vote on the proposed standard once the working group completes its work. The balloting group must include a balance of individuals from affected interests such as government, industry, academia, and other interested persons to prevent any one interest group from dominating the balloting. *IEEE-SA Standards Board Bylaws* at 9, (2005) http://standards.ieee.org/guides/bylaws/ (hereinafter "*Standards Board Bylaws*"); *Operations Manual* at 19.

Members of the balloting group vote either to affirm or disapprove the proposed standard. If a balloting group member votes to disapprove a proposed standard, he or she must explain in writing the reasons for his or her disapproval. *Operations Manual* at 21.

The balloting group can only approve a standard if the balloting meets two criteria: a minimum of seventy-five percent of all ballots must be returned, and seventy-five percent of the returned ballots must approve the standard. *Id* at 22. Comments associated with negative votes,

however, must be addressed directly, in writing, by a ballot review or comment resolution committee ("BRG") even if a ballot has already received the necessary minimum number of responses and approvals. *Id.* The BRG must attempt to resolve the objections and redistribute the standard, along with the comments and comment resolutions, to the entire balloting group. Such redistribution ensures that all of the balloters are fully informed as to any potential disagreements with any aspect of the proposed standard and provides all balloters an opportunity, in light of those disagreements, to change their votes.

If and when the foregoing requirements are satisfied, the standard and its supporting materials are submitted to the Standards Board's Review Committee ("RevCom"). *Operations Manual* at 24. The RevCom examines the standard and associated documentation to ensure that the proper procedures were followed throughout the development of the standard. *Id.* If the RevCom is satisfied that the rigorous mandatory due process procedures were followed, it will recommend approval of the standard to the Standards Board. If, however, the RevCom finds the process potentially lacking in any way, it will send the proposed standard back to the sponsor to address those shortcomings.

If the RevCom recommends approval of a standard, it sends the proposed standard and its recommendation to the Standards Board, which votes either to ratify or deny it. *Standards Development.* If the Standards Board ratifies the recommendation of the RevCom, the draft standard is approved for publication as an IEEE standard. *Id.* Once so approved, the IEEE standard may be submitted to ANSI for approval, pursuant to ANSI procedures, as an American National Standard.

Throughout this process, anyone who disputes any formal decision with respect to a proposed standard has a right to appeal. *IEEE Standards Companion* (2003), http://standards.ieee.org/guides/companion/. There are two types of appeals: procedural and technical. *Id.* Technical appeals, filed prior to the approval of a standard, are returned through the sponsor to the working group for evaluation and handling. *Id.* Procedural appeals are heard by the Standards Board, through a panel established by it. *Id.* A written record is made of all appeals, procedural and technical.

II. THE STANDARDS AT ISSUE WERE DEVELOPED IN FULL COMPLIANCE WITH THE IEEE'S RIGOROUS PROCEDURES

A. The C95.1-1991 and C95.3-1991 Standards Are the Products of a Balanced, Lengthy, and Thorough Development Process

The C95.1-1991 standard at issue sets forth recommended human exposure limits to electromagnetic fields in a specific frequency range. *See Exposure Standard* at 4-11.[4] The C95.3-1991 standard specifies techniques and instrumentation for the measurement of electromagnetic fields, including the recommended methods to measure and determine the specific absorption rate ("SAR") of RF energy in humans exposed to electromagnetic fields. *See Measurement Standard* at 45-63.

Although the IEEE approved these standards in 1991, they have a long history that dates from research and studies

[4] The C95.1-1991 and C95.3-1991 standards are published by and are publicly available through the IEEE.

on biological effects of RF exposure begun in the 1940's and 1950's. In approximately 1960, ANSI (then the American Standards Association),[5] along with the Department of the Navy and the Institute of Radio Engineers (now the IEEE), initiated the Radiation Hazards Standards project. R.C. Petersen, *Radiofrequency Safety Standard-Setting in the United States*, *in* Electricity and Magnetism in Biology and Medicine 761, 761 (Ferdinando Bersani ed., 1999) (hereinafter *Petersen*). That project, in turn, established Committee C95, which was charged with developing RF/microwave safety standards. *See* J.M. Osepchuk & R.C. Petersen, *Historical Review of RF Exposure Standards and the International Committee on Electromagnetic Safety (ICES)*, 6 Bioelectromagnetics Supplement S7, S8 (2003), *available at* http://www3.interscience.wiley.com/cgi-bin/fulltext/106565259/PDFSTART (hereinafter *Historical Review*). Committee C95 published its first standard in 1966, which was approved as an ANSI standard. *Id.* The Committee made further revisions in 1974 and 1982, both of which were also approved as ANSI standards. *Id.*

Committee C95 began developing revisions to the 1982 ANSI standard shortly after that standard was approved. In approximately 1988, ANSI stopped sponsoring such committees. *Id.* at S11. Committee C95 nevertheless continued its work as an ANSI-accredited committee, and in approximately 1990, the IEEE assumed sponsorship for it and redesignated it as IEEE SCC 28. *Id.* at S8. SCC 28 was an interdisciplinary committee consisting of experts in a broad range of fields, including engineering, medicine, and research, drawn from academia, government, industry, and user groups. Dr. Thomas F. Budinger, M.D., a member of

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[5] ANSI has also submitted an *amicus* brief in support of the petition for *certiorari*.

the National Institute of Medicine, was named Chair of the new SCC 28. *Id.* at S11.

The day-to-day work on the two standards was performed by two SCC 28 subcommittees, SC-4 (for the C95.1-1991 standard) and SC-1 (for the C95.3-1991 standard). SC-4 was comprised of approximately 125 members. Of those 125 members, ninety were involved in research, twelve worked in industry; four were industry consultants, five were with government agencies, and fourteen were independent consultants or members of the general public. *Id.* at S9; *Petersen* at 762.

SC-4 critically and exhaustively examined the scientific literature on RF bioeffects through its own working subgroups. Initially, the Literature Surveillance Group of SC-4 selected a subset of relevant articles from the thousands of papers related to that subject matter. *Petersen* at 762. The Literature Surveillance Group rejected articles that were not peer-reviewed to determine their worthiness for scientific publication. From the remaining population of peer-reviewed studies, the Literature Surveillance Group placed greater emphasis on including more recent publications, which were likely to reflect the latest scientific findings; those that presented significant findings (positive or negative) on issues of public health; and those relevant to concerns expressed by citizen groups. If several studies showed adverse health effects, the Literature Surveillance Group selected those showing effects at the lowest exposure levels or with the longest exposure duration. This winnowing process yielded a body of 321 articles for further examination. *Id.*

Specialized working groups of SC-4 such as the Engineering Validation and Biological Validation Groups next evaluated in detail the scientific results described in the

321 selected articles. *Id.* at 762-63. Evaluation criteria included relevance to the standard, scientific quality and originality, and data reliability. *Id.* at 763. A separate Statistical Evaluation Group evaluated articles that employed questionable statistical methods. *Id.* This process produced a final standards database of 119 relevant peer-reviewed studies and papers. *Exposure Standard* Annex B. A Risk Assessment Group then evaluated the human exposure risks implicated by those studies. *Petersen* at 763.

Although IEEE procedures did not require formal balloting at the working group level, SC-4 nevertheless followed strict balloting procedures similar or identical to those for a sponsor's approval of the standard. The SC-4 balloting group consisted of the entire SC-4 membership, which voted on numerous drafts of the proposed standard before submitting its final version to SCC 28 for formal balloting.

The SCC 28 balloting group had thirty-six individual members: six worked in applied research; eight were engaged in basic research; five worked in industrial or commercial businesses; eleven were categorized as administrative, including some affiliated with the United States military (Army, Air Force, and Navy); and the remaining six were consultants and other interested parties. Three from the group were with the U.S. Food & Drug Administration. IEEE Standards Board Form for Submittal of Proposed Standards, C95.1 submitted by Ronald C. Petersen (August 14, 1991) (hereinafter "*Submittal Form C95.1*") (on file with the IEEE).

The SCC 28 balloting group initially approved the standard by the required affirmative vote of seventy-five percent of the ballots cast. Letter from Ronald C. Petersen, Acting Secretary, SCC 28, to the Voting Membership, SCC

28, (undated) (on file with the IEEE). Because, however, there were five negative votes, SCC 28 formed a Negative Ballot Committee to address those votes. *Id.* That Committee consisted of six members, including two of the individuals who cast negative votes. *Id.* After further deliberation and consultation, the Negative Ballot Committee proposed a slight revision to the draft standard and submitted a new ballot, with the proposed revision, to all ballot committee members. *Id.* The balloting committee thereafter approved the standard with thirty affirmative votes and two negative votes. Four members, all affiliated with the U.S. military, did not return their ballots. *Submittal Form C95.1.*

The C95.3-1991 standard, which was developed by SC-1 in conjunction with the C95.1-1991 standard, followed the same rigid due process procedures. The final balloting group comprised a balanced group of thirty-six individuals. IEEE Standards Board Form for Submittal of Proposed Standards, C95.3 submitted by Ronald C. Petersen (May 14, 1991) (on file with the IEEE). Thirty-one of the thirty-six ballots sent were returned, and twenty-nine of those were affirmative votes. The remaining two were abstentions. *Id.*

The IEEE Standards Board approved the revisions of IEEE Std C95.1-1991 and IEEE Std C95.3-1991 on September 26, 1991. ANSI approved the C95.3-1991 standard on May 6, 1992, and the C95.1-1991 standard on November 18, 1992.

B. Even After Their Approval, the C95.1-1991 and C95.3-1991 Standards Continued to Undergo Review and Revision in Accordance with the IEEE's Formal Standards-Development Requirements

SCC 28, which has grown over the years and is now named the International Committee on Electromagnetic Safety ("ICES"), continued to review scientific data and studies relating to the potential health and biological effects of RF electromagnetic fields throughout the 1990's and up to the present. *See generally Historical Review*. As with the initial standards-development process, this ongoing review process was open to all interested parties, including Respondents and their experts. As a result of this effort, the Standards Board reaffirmed the C95.1-1991 standard in 1997, and in 1998 it approved C95.1a, a supplement to the standard. Similarly, the Standards Board approved a revised C95.3-1991 on December 11, 2002. IEEE Std C95.3-2002. Most recently, the Standards Board approved a further revised Exposure Standard, IEEE Std C95.1-2005, which will soon undergo the ANSI review, approval, and appeal process. All of these revisions were voted on and approved in accordance with the IEEE requirements and procedures described herein.

III. THE FOURTH CIRCUIT'S DECISION SERIOUSLY HARMS THE PUBLIC INTEREST BY PERMITTING MULTIPLE JURIES AND COURTS TO SUBSTITUTE THEIR JUDGMENTS ON HEALTH AND SAFETY MATTERS FOR CAREFULLY DEVELOPED, SCIENCE-BASED CONSENSUS STANDARDS

The hundreds of unpaid volunteers who developed and approved the IEEE standards went to extraordinary lengths to ensure that those standards were based on the best

scientific evidence available. They spent countless hours reviewing and analyzing hundreds of scientific studies, and countless more hours drafting, discussing and debating the content of the standards themselves. They considered evidence and arguments from all constituent groups of affected parties, and they responded to every negative vote on the standards. Due process was ensured at every step of the process, which culminated in ANSI approval of the standards as American National Standards.

The public interest is best served by health and safety standards based on the best available scientific evidence, not on fear, conjecture, and unproven assertions. The process followed by the IEEE is widely recognized as being sound, balanced, and fair. Indeed, the IEEE standards themselves are neither mandatory nor binding on any entity, but because they reflect a consensus, fairly and openly reached, of a broad range of experts, they instill confidence in policy makers, regulators, and the public.

The decision below, if allowed to stand, would permit individual federal and state courts around the country to second-guess those standards and independently decide what is or is not adequate to protect the public health and safety. In essence, the decision below would allow lay juries and judges in each and every court around the country to substitute their judgments—based solely on whatever evidence litigants are able to present—for the consensus standards arrived at by the work of hundreds of experts and volunteers over a more than eight-year period. This is a particularly unnecessary, inefficient, costly, and unpredictable method to protect the public safety.

The development of the standards at issue were open to public observation and participation. Respondents and their experts had ample opportunity to challenge any aspect

of the standards at various stages before and after their adoption. Moreover, respondents and their experts were free to participate in the ongoing work of SCC 28 from 1991 through the present, including the various revisions to the standards. They were also free to participate in the FCC rulemaking process that led to the regulations at issue. Accordingly, there is no reason to allow them now to collaterally attack those regulations and standards.

In addition, the risk of inconsistent judgments in the litigation process is enormous. Some courts may decide that the standards are not adequate, while others may hold to the contrary. The result could be either court-ordered standards that are too costly to comply with or, much worse, standards or other requirements that, while seemingly more stringent, may actually increase the risks to the public health and safety. *See, e.g.*, Pet'r App. at 71a n.23 (citing the district court's observation that RF shields for cellular telephones may actually increase human exposure to RF energy.) In either event, such inconsistent judgments will increase public confusion and decrease public confidence in <u>any</u> standard.

Allowing such collateral attacks on voluntary safety standards and federal regulations based on them is also hugely costly and a waste of judicial resources. It is especially costly to nonprofit SDO's such as the IEEE. The IEEE has already been named as a defendant in seven pending tort cases in which the plaintiffs directly attack the adequacy of the IEEE standards at issue. The risk of such litigation could deter voluntary SDO's such as the IEEE from continuing their standards-related work. Indeed, ANSI reportedly ceased its standards sponsorship activities in 1988 at least in part because of the risk of litigation liability. *Historical Review* at S11.

Moreover, even if the IEEE and other SDO's could bear the potentially crippling cost of defending their standards in court after court around the country, there is still the substantial risk that such litigation could deter experts from devoting their time and talents to a process that may be endlessly litigated and ultimately ignored. Without expert volunteers, neither the IEEE nor other voluntary standards-development organizations can develop any standards.

The loss of private, consensus standards-development organizations would be a serious blow to the public interest. In 1998, the federal Office of Management and Budget promulgated Circular No. A-119, issued pursuant to the National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12, 110 Stat. 775, 782-783 (codified at 15 U.S.C. § 272 (1996)). That Circular explicitly notes the benefits of federal agency use of privately developed consensus standards in fulfilling the agency's mission. Those benefits include elimination of the Government's cost of developing its own standards; provision of incentives and opportunities to establish standards that serve national needs; encouragement of long-term growth for U.S. enterprises and promotion of efficiency and economic competition through harmonization of standards; and furtherance of the policy of reliance on the private sector to supply Government needs. OMB Circular No. A-119 (revised), Feb. 10, 1998, at ¶ 2. Accordingly the Circular expressly "directs [federal] agencies to use voluntary consensus standards in lieu of government-unique standards except where inconsistent with law or otherwise impractical." *Id.* at ¶ 1. The Circular also expressly states that "[a]ll federal agencies must use voluntary consensus standards in lieu of government-unique standards in their procurement and regulatory activities, except where inconsistent with law or otherwise impractical." *Id.* at ¶ 6 (emphasis added).

The IEEE standards at issue represent the best effort of the entire affected scientific community to establish consensus, science-based standards that protect the public health and safety. There were ample opportunities for any person, entity, or expert to observe, participate in and challenge their adoption. The decision of the Fourth Circuit, if allowed to stand, would undermine the private consensus standards-development process and the many invaluable benefits and protections to the public that it provides.

CONCLUSION

For the foregoing reasons, the IEEE respectfully submits that this case is one of exceptional importance that merits review by this Court.

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IN THE

Supreme Court of the United States

NOKIA INC., *et al.*,

Petitioners,

v.

GARRETT NAQUIN, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PARTIES TO THE PROCEEDING

In the Brief for Respondents in Opposition, Respondents suggested that four of the named Petitioners lacked standing. They have since withdrawn that contention. *See* Letter from H. Thomas Howell, Counsel for Respondents, to the Hon. William K. Suter, Clerk, Supreme Court of the United States (October 10, 2005). Thus, the statement of parties to the proceeding in the Petition is accurate and remains unchanged.

CORPORATE DISCLOSURE STATEMENT

Petitioners' corporate disclosure statement was set forth at page *iv* of their Petition for a Writ of Certiorari, and there are no amendments to that statement.

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I. THE OPPOSITION ACTUALLY HIGHLIGHTS THE NEED FOR THIS COURT'S REVIEW.

Respondents spend the majority of their Opposition engaged in a futile effort to defend the merits of the Fourth Circuit decision. What they cannot deny is that a divided panel of the Fourth Circuit decided issues of national importance, and that the decision below conflicts with the position of the Federal Communications Commission ("FCC"), the considered views of other courts of appeals, and this Court's own recent decisions on federal preemption by agency rule. Nor can Respondents deny that the issues presented by the Petition, including the meaning and application of the "presumption against preemption," and the proper relationship between express and implied preemption, are important questions of federal law that have divided the Members of this Court and the courts of appeals.

As the numerous briefs *amicus curiae* in support of certiorari demonstrate, these issues transcend the context in which they are presented, and implicate the power of any federal agency to promulgate uniform national standards pursuant to Congressional mandate. The Opposition's attempt to recast the complaint as a garden variety breach of warranty action and to run away from the actual holding of the panel opinion is factually inaccurate and belied by both the dissent below and the careful opinion of the district court. For these reasons, discussed more fully below, the Petition for a Writ of Certiorari should be granted.

1. The Opposition does not and cannot seriously contest the national importance of the issues raised by the Fourth Circuit's decision. The lower court's rejection of uniform national standards in the area of interstate communication by radio threatens not only the efficient operation of the Nation's wireless infrastructure, but countless other regulatory regimes where the primacy of federal law has heretofore been unquestioned. Chamber Br. 15-16 (listing cases). As the Petition

demonstrates (without rejoinder), the recognition that the technical standards governing interstate communication by radio must be uniform and must transcend state and local boundaries dates back nearly a century. Pet. 4, 24. Since at least the Radio Act of 1927, Congress has recognized that the federal government must maintain exclusive control of the airwaves, that it must do so through centralizing control in an expert federal agency, and that such control must include plenary authority over licensing, signal strength, and the design and operation of the equipment used. Pet. 5-9; CTIA Br. 7-11.

There is an equally long history of federal preemption of *any* attempt at state regulation in this area. Both the court below and the Opposition attempt to cast this federal presence as isolated pin pricks of federal preemption in a field otherwise open to state regulation. This approach, which the Chamber of Commerce aptly labels the "'*expressio unius*' rule of preemption," Chamber Br. 13, can be used to fractionate even the most pervasive of federal regulatory schemes. Like Washington State's attempts to regulate the technical and operational characteristics of oceangoing tankers, *see Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 177-78 (1978) *and United States v. Locke*, 529 U.S. 89, 100 (2000), the decision below thrusts states into a role they have never played before—direct regulation of the design and operation of an important channel of interstate communication. *See* Pet. 20-21.

Nor can the Opposition seriously dispute the importance of the wireless network to national security, public safety, and our Nation's economy or the harm that disparate state design and operational standards would do to this critical piece of national communications infrastructure. Respondents do not even confront the FCC's conclusion that interstate interoperability is a central goal of federal wireless policy and that any form of additional state regulation of technical standards would interfere with that goal. *See Use of the Bands 824-845 MHz and 870-890* MHz, 89 F.C.C.2d 58,

91, ¶ 81 (1982) ("It is imperative that no additional requirements be imposed by the states which could conflict with our standards and frustrate the federal scheme for the provision of nationwide cellular service."). Respondents simply cannot deny that their lawsuit attempts to impose "additional requirements" on wireless telephones and that those requirements are based on a rebalancing of priorities that are explicitly embodied in the FCC's decision as to where to draw the regulatory line in the area of RF emissions.

Respondents argue that the relief sought – a request for a headset requirement – somehow militates against federal preemption here. Opp. 16. But, as the Petition and the district court opinion made clear, it is the *theory of liability itself that conflicts with federal law.* The gravamen of the complaint is that wireless telephones emit unsafe RF levels and that a headset mandate and literature informing consumers that a headset enhances RF safety are necessary remedies. As the Fourth Circuit quite candidly recognized, that theory of liability requires the state court to conduct its own "risk/utility" balance and arrive at a conclusion different from that reached by the federal agency. App. 19a-20a. Nothing in the lower court's opinion places any limit on the state court's remedial power once it has found that FCC-certified wireless telephones pose a danger to consumers, and the Opposition offers no such limiting principle. No matter how creative Respondents are in crafting their prayer for relief, they cannot avoid the conflict that their underlying theory of liability presents.

The unprecedented nature of the decision below, the novel exercise of state judicial power it endorses, and the threat that disparate state regulation poses to numerous aspects of federal wireless policy clearly justify this Court's intervention. CTIA Br. 9-20. Moreover, if the Court has any doubt about the position of the United States and the FCC on these issues, it should call for the views of the Solicitor General. The Opposition cannot deny that those views have doctrinal relevance here, Pet. 24-

25, nor can it deny that the FCC took the extraordinary step of attempting to file a brief in support of rehearing *en banc* in the court below, App. 184a, which was thwarted only because the court denied the petition on the very day the brief was to be filed. Opp. 13 n.8.

2. The Opposition does not and again cannot deny that the Petition presents important questions regarding the meaning and application of the "presumption against preemption," a *threshold issue* in every federal preemption case. It is an issue upon which the district court and the panel opinion came to diametrically opposed conclusions. The Opposition does not even attempt to address the substantial conflict in the circuits over what constitutes "a history of significant federal presence" and at what level of generality the "area" of regulation should be defined.[1] Pet. 26 n.6; PLAC Br. 7-13. As PLAC points out, that confusion runs so deep that the Ninth Circuit has held that interstate communication *by wire* (*e.g.*, traditional "long distance" calls) is an area where the *Locke* exception applies, while the Fourth Circuit has concluded that interstate communication *by radio* is an area that falls outside the reasoning of *Locke*. *Compare Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003), *with* Pet. App. 34a-35a & 34a n.4.

Respondents play a level of generalities game with *Locke* to avoid the otherwise inevitable conclusion that the regulation of interstate communication by radio frequency emissions qualifies for the *Locke* exception. Respondents characterize the

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1. The application and meaning of *Locke* recently divided a panel of the Ninth Circuit, *compare Air Conditioning and Refrigeration Inst. v. Energy Res. Conservation Ass'n*, 410 F.3d 492, 496 (9th Cir. 2005), *with id.* at 506 (Noonan, J. dissenting). This decision has resulted in another petition for certiorari asking the Court to clarify its jurisprudence surrounding the so-called "presumption against preemption." Petition for a Writ of Certiorari, *Air Conditioning and Refrigeration Inst. v. Energy Res. Conservation Ass'n*, No. 05-331 (U.S. filed Sept. 12, 2005).

state interest behind their lawsuits in absurdly capacious terms: "State and local *health and safety regulation* has been applied to *consumer products* for decades," Opp. 24 (emphasis added). By contrast, they define the area of potential significant federal presence as narrowly as possible. *Id.* ("the FCC did not begin regulating" the *RF radiation* from "*hand-held cellular telephones*" until 1996) (emphasis added).[2] Thus, Respondents' own brief vividly demonstrates how the outcome of the *Locke* analysis can be manipulated by the manner in which the two poles of the question are defined.

3. Respondents have no response to the Petition's showing that the Fourth Circuit's opinion conflicts with the decisions of this Court with respect to agency conflict preemption. Pet. 18-19. As the Petition explains, the Fourth Circuit's decision cannot be reconciled with the Court's cases, which hold that in agency conflict preemption "'a narrow focus on Congress' intent to supersede state law [is] misdirected.'" Pet. 19 (quoting *City of New York v. FCC*, 486 U.S. 57, 64 (1988)); *see also* Chamber Br. 8-9. Respondents appear to back away from the full import of the Fourth Circuit's holding, but still contend that the presence of an expressly preemptive statute "implies that matters beyond that reach are not pre-empted." Opp. 22 (quotation omitted) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) and citing *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995)). However, as Respondents themselves grudgingly

2. On this point, the Opposition is wrong as a factual matter. The FCC's "categorical exclusion" of wireless handsets from its first RF rules in 1985 was not based on a lack of authority or an intent to leave the regulation of such devices to the states, as the Opposition insinuates. Opp. 3. In fact, such devices were excluded from complying with specific rules for emissions evaluation "based on calculations and measurement data indicating that they would not cause exposures that would violate the ANSI guidelines under normal and routine conditions of use." *Guidelines for Evaluating Environmental Effects of Radiofrequency Radiation*, 8 F.C.C.R. 2849, 2849, ¶ 5 (1993).

admit, this Court has clearly held that the inclusion of an express preemption clause "does not bar the ordinary workings of conflict preemption." *Id.* (citing *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000)). In *Geier* the Court explicitly foreclosed the possibility, left open in *Freightliner*, that the presence of an express preemption clause could justify an inference or "special burden" against preemption by agency rules. *Geier*, 529 U.S. at 873.

4. Respondents also cannot explain away the conflict between the Fourth and the Seventh Circuits over the scope of express statutory preemption. *See Bastien v. AT&T Wireless Servs. Inc.*, 205 F.3d 983 (7th Cir. 2000). Respondents attempt to distinguish *Bastien* on the grounds that the Court is obligated to assume the truth of Respondents' factual allegations in deciding Petitioners' motion to dismiss, and that these factual allegations would allow the Respondents to show that Petitioners are "active participants in the market and are providing wireless service." Opp. 28.[3] As a result, Respondents contend, "[i]t is not 'entry' regulation to subject [Petitioners'] post-entry activities to the lawful exercise of police powers and to judicial scrutiny under general law providing remedies for wireless phone consumers." *Id.* This is sheer sophistry. Section 332(c)(3)(A)'s prohibition of "entry regulation" excludes a

3. Respondents also attempt to avoid the conflict between *Bastien* and the decision below by falling back on the completely contrived distinction between portable and fixed transmitters, a contrivance that runs through the Fourth Circuit's analysis. Opp. 22. As explained in the Petition, this dichotomy is contrary to the FCC's own understanding and regulations, and contrary to technological reality. Pet. 29-30. The deployment and placement of wireless base stations and their signal strength simply cannot be divorced from the design and signal strength of the wireless handsets that interact with them. Once this fiction is stripped away, it becomes clear that *Bastien* stands for the proposition that technical aspects of network design fall within an "exclusively federal" sphere and that *Pinney* rejects that conclusion. *See also* CTIA Br. 3, 8.

substantive category of regulatory mandates from state authority – it denies the state "any authority" to impose such regulation on new entrants *or* existing carriers. In *Bastien* itself the defendant wireless service provider had already entered the market, and was confronting "judicial scrutiny under general law providing remedies for wireless phone consumers," Opp. 28, in the form of a suit alleging that it had violated state contracts laws by misrepresenting the capabilities of its network. *See Bastien*, 205 F.3d at 985.

Respondents attempt to blunt the holding of *Bastien* by citing two FCC decisions that relate to "other terms and conditions," 47 U.S.C. § 332(c)(3)(A), of wireless service. *See* Opp. 29. But these decisions do not involve technical mandates for equipment design, which the FCC has found to be clear examples of prohibited entry regulation. Pet. 29 (citing *Petition on Behalf of the State of Haw.*, 10 F.C.C.R. 7872, 7883, ¶ 57 n.120 (1995)).

II. THE OPPOSITION'S ATTEMPT TO DEFEND THE DECISION BELOW ON THE MERITS FAILS.

1. Respondents falsely contend that the FCC's authority to enact RF regulations stems from Section 704(a) of the 1996 Act. Opp. 18-19. In fact, exclusive federal control over every technical aspect of radio regulation dates back to 1927, and exclusive authority over radio was given to the FCC upon the agency's creation in 1934.[4] Pet. 5. Title III of the Communications Act plainly empowers the Commission to adopt rules pertaining to every aspect of radio transmissions, including RF emissions generally and the health and safety effects of those emissions specifically. *Id.* at 9-10; CTIA Br. 4-

4. Because the Commission's authority over RF predates the enactment of the 1996 Act by more than 60 years, the Respondents' extensive reliance on Section 601(c) of the 1996 Act is misplaced. Opp. 23. Even if this savings clause could be interpreted to limit agency conflict preemption, which it cannot, *see Geier*, 529 U.S. at 869, it only pertains to the provisions of the 1996 Act itself.

6. When the FCC enacted its first RF emissions guidelines in 1985, 11 years prior to the enactment of Section 704(a), it relied upon its general regulatory authority under the Communications Act in order to do so. Pet. 9-10. Contrary to Respondents' suggestion, Opp. 3, 20, the decision to exclude certain facilities from this first set of guidelines was based on reasoned analysis, *not* a lack of authority. Nowhere in its 1985 Order did the FCC express doubt about its ability to apply RF requirements to any and every service regulated by the Commission. *Biological Effects of Radiofrequency Radiation*, 100 F.C.C.2d 543 (1985).

Respondents' attempt to turn the express preemption of certain local zoning rules in the 1996 Act into a *limitation* on Commission authority to adopt broadly preemptive rules is specious. Section 332(c)(7), entitled "Preservation of Local Zoning Authority," was designed to preserve certain limited state authority in the face of pervasive federal regulation. It is a specific example of Congressional concern over state and local laws intruding into the design and operation of the wireless network. *See* CTIA Br. 14-15. It is not, as Respondents would have it, Opp. 22, an implicit rejection of the exclusivity of federal regulation in the face of competing state regulation other than zoning laws.

Section 704(b), in contrast, is a targeted command for the FCC to complete its rulemaking in a specified docket and "prescribe and make effective rules regarding the environmental effects of radio frequency emissions." App. 135a. The Notice of Proposed Rulemaking in the docket cited by Section 704(b), which initiated the rulemaking that the FCC was directed to complete within 180 days, applied to radio emissions from *all* FCC regulated services. *See Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 8 F.C.C.R. at 2849, ¶ 1 (noting that "[t]his proposal could affect a wide variety of radio services, e.g., AM, FM, and TV broadcast services; *common-carrier land-mobile services*; and private-radio land-mobile services")(emphasis added). By citing this

specific docket number, Congress clearly understood that it was requiring the FCC to promulgate RF standards for *all* regulated services, including cellular telephony.

2. Respondents' attempt to minimize the conflict between their suit and federal regulations by recasting their claims must fail. First, to sustain a redhibition claim under Louisiana law, there must be "defects, or vices, in the thing sold." La. Civ. Code art. 2520. This is an implied warranty, written into every contract in Louisiana by operation of statute. *See, e.g., Young v. Ford Motor Co.*, 595 So. 2d 1123, 1127 (La. 1992). Thus, Respondents' claim that "redhibition does not impose a state law requirement" is simply false. Opp. 15. Second, as the Respondents admit, their "express warranty and contract claims" are "predicated on state-law duties *not to conceal material facts* and not to conspire *to commit fraud*." Opp. 15 (emphasis added).[5] The Seventh Circuit found that similar breach of contract and fraud claims were preempted by the FCC's comprehensive regulation of network design and coverage. *Bastien*, 205 F.3d at 986. Absent a finding that cellular telephones are defective or pose a danger to their users, there is no redhibition claim, no "material fact" to conceal, and no "fraud" to commit.

III. THIS CASE SQUARELY PRESENTS THE LEGAL ISSUES RAISED BY THE PETITION.

1. Respondents' assertion that Petitioners "never argued agency conflict preemption . . . nor discussed it in the

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5. Respondents' Magnuson-Moss claims, Opp. 13-14, are derivative of state law warranty claims. *See, e.g., Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1011 (D.C. Cir. 1986) ("Under the terms of Magnuson-Moss, state law governs the existence and basic meaning of implied warranties."); *see also* 15 U.S.C. § 2301(7) ("[t]he term 'implied warranty' means an implied warranty *arising under State law* . . . in connection with the sale by a supplier of a consumer product") (emphasis added). Preemption of inconsistent state law will thus also resolve the Magnuson-Moss claims.

proceedings below," Opp. 17, is preposterous. Petitioners argued extensively below that the Respondents' claims were preempted by agency action, as well as by the plain text of the statute. *See* Appellee's Br. 39-42, *Pinney v. Nokia*, No. 03-1433 (4th Cir. Oct. 3, 2003) (citing *Geier*, 529 U.S. at 881; *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708 (1984)). Moreover, the District Court relied heavily on action by the FCC and FDA in determining that Respondents' suit was barred by implied conflict preemption, App. 64a-72a, and distinguished its decision from an earlier opinion in the Eastern District of Louisiana, in part, on the grounds that the earlier opinion was based solely on the Communications Act and did not consider "numerous FCC regulations." *Id.* at 64a.

2. Respondents' claim that there are "finality" problems that arise from the posture of this case, Opp. 13-14, is equally meritless. Resolution of the preemption issue would dispose of the entire case. As set forth above, all of Respondents' claims stand or fall on the question whether cellular telephones may be judged unsafe or defective under state law despite their compliance with FCC rules. Where resolution of an issue is "fundamental to the further conduct of the case," review of that issue by this Court is proper. *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *see also United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). Respondents' own concession that the "trier-of-fact [is] free to decide in favor of the Petitioners on any permissible ground *other than preemption*," Opp. 13 (emphasis added), highlights that the question of preemption is a pure question of law that will not be illuminated by further proceedings below.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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